(13)

No. 03-287
Title: Reginald A. Wilkinson, Director, Ohio Department of Rehabilitation and Correction, et al., Petitioners
v.
William Dwight Dotson, et al.
Docketed: August 22, 2003
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (00-4033, 00-4051)
Decision Date: May 19, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Aug 18 2003	Petition for writ of certiorari filed. (Response due September 22, 2003)
Aug 18 2003	Appendix of Reginald A. Wilkinson, Director, Ohio Department of Rehabilitation and Correction, et al. filed.
Sep 22 2003	Brief of respondent William Dwight Dotson, et al. in opposition filed.
Sep 22 2003	Brief amicus curiae of State of Alabama, et al. filed.
Oct 8 2003	DISTRIBUTED for Conference of October 31, 2003.
Oct 8 2003	Reply of petitioners Reginald A. Wilkinson, Director, Ohio Department of Rehabilitation and Correction, et al. filed. (Distributed)
Feb 25 2004	DISTRIBUTED for Conference of February 27, 2004.
Feb 26 2004	Supplemental brief of petitioners Reginald A. Wilkinson, Director, Ohio Department of Rehabilitation and Correction, et al. filed. (Distributed)
Mar 1 2004	DISTRIBUTED for Conference of March 5, 2004.
Mar 15 2004	DISTRIBUTED for Conference of March 19, 2004.
Mar 22 2004	Petition GRANTED.
Apr 27 2004	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including July 5, 2004.
Jun 15 2004	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Jun 25 2004	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including July 19, 2004.
Jul 19 2004	Brief amici curiae of Alabama, et al. filed.
Jul 19 2004	Brief of petitioners Reginald A. Wilkinson, Director, Ohio Department of Rehabilitation and Correction, et al. filed.
Jul 19 2004	Joint appendix filed.
Jul 21 2004	Extension of time within which to file brief of respondent Dotson to and including October 1, 2004.
Sep 8 2004	Motion for divided argument filed by respondents.
Sep 17 2004	Extension of time within which to file respondents' brief on the merits to and including October 15, 2004.
Sep 22 2004	Letter proposing a lodging received from counsel for amici Incarcerated and Former Ohio Inmates.
Sep 28 2004	Brief amici curiae of 2,974 Former and Current Ohio Inmates and Named Plaintiffs in Michael v. Ghee filed. (Distributed)

Sep 28 2004	One copy of Ohio Parole Board Guidelines and one bound copy of names of 2,974 amici submitted by counsel for amici.
Sep 29 2004	SET FOR ARGUMENT ON Monday, December 6, 2004.
Sep 30 2004	CIRCULATED.
Oct 15 2004	Brief of respondent William Dwight Dotson filed. (Distributed)
Oct 15 2004	Brief of respondent Rogerico Johnson in opposition filed. (Distributed)
Nov 8 2004	Motion for divided argument filed by respondents GRANTED.
Nov 19 2004	Reply of petitioners Reginald A. Wilkinson, Director, Ohio Department of Rehabilitation and Correction, et al. filed. (Distributed)
Dec 1 2004	Record received from U.S.C.A. 6th Cricuit. (1 box including 2 binders)
Dec 6 2004	Argued. For petitioners: Douglas R. Cole, State Solicitor, Columbus, Ohio. For respondent Johnson: John Q. Lewis, Cleveland, Ohio. For respondent Dotson: Alan E. Untereiner, Washington, D.C.

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Supreme Court, U.S.
FILED

No. 03 287 AUG 18 2003

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In The Supreme Court Of The United States

REGINALD WILKINSON, Director, et al.,
Petitioners,

v.

WILLIAM DWIGHT DOTSON, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition arises from one of the many cases considering which prisoner claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). *Heck* holds that a prisoner cannot advance a claim under 42 U.S.C. § 1983 where success on that claim would "necessarily imply the invalidity of his conviction or sentence . . . unless . . . the conviction or sentence has already been invalidated." *Id.* at 487. This is *Heck*'s so-called "favorable termination requirement."

The Sixth Circuit concluded below that *Heck*'s favorable termination requirement does not cover claims challenging parole procedures because success on those claims would not necessarily guarantee speedier release, but instead would provide only a new parole hearing. This raises the following questions:

1. When a prisoner invokes § 1983 to challenge parole proceedings, does *Heck v. Humphrey*'s favorable termination requirement apply where success by the prisoner on the claim would result only in a new parole hearing and not necessarily guarantee earlier release from prison?

2. Does a federal court judgment ordering a new parole hearing "necessarily imply the invalidity of" the decision at the previous parole hearing for purposes of *Heck v. Humphrey*?

LIST OF PARTIES

The Petitioners are Ohio prison officials:

Reginald Wilkinson, the Director of the Ohio Department of Rehabilitation and Correction ("ODRC").

Margarette Ghee, the former chair of the Ohio Parole Board.

The Respondents are two prisoners in the custody of ODRC:

William D. Dotson
Rogerico J. Johnson

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In The Supreme Court Of The United States

REGINALD WILKINSON, Director, et al.,
Petitioners,

v.

WILLIAM DWIGHT DOTSON, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Reginald Wilkinson, the Director of the Ohio Department of Rehabilitations and Corrections, and Margarette Ghee, the former Chair of the Ohio Parole Board, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

This petition arises from two separate cases below that were consolidated for *en banc* review, *Dotson v. Wilkinson* and *Johnson v. Ghee*.

The district court decision in *Dotson* was captioned as *Dotson v. Wilkinson*, Case No. 3:00 CV-7303 (N.D. Ohio, Aug. 7, 2000). It is reproduced at App. 47a-51a. The panel decision from the court of appeals was reported as *Dotson v. Wilkinson*, 300 F.3d 661 (6th Cir. 2002). It is reproduced at App. 36a-46a. The Sixth Circuit's *en banc* decision is reported as *Dotson v. Wilkinson*, 329 F.3d 463 (6th Cir. 2003). That decision is reproduced at App. 4a-35a.

The district court decision in *Johnson* is captioned as *Johnson v. Ghee*, Case No. 4:00 CV 1075 (N.D. Ohio, July 16, 2000). It is reproduced at App. 52a-56a. The Sixth Circuit did not issue a panel opinion. Instead, it consolidated *Johnson* with *Dotson* for *en banc* disposition. Accordingly, the Sixth Circuit decision in *Johnson* is also reported as *Dotson v. Wilkinson*, 329 F.3d 463 (6th Cir. 2003). As noted above, that decision is reproduced at App. 4a-35a.

JURISDICTIONAL STATEMENT

The judgments and opinion below were entered May 19, 2003. No rehearing petition was filed below. Petitioners invoke the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case turns on two sets of statutes. No constitutional provisions are at issue. The first statute is 42 U.S.C. § 1983, which states in relevant part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

The other relevant statutes govern federal habeas corpus proceedings, 28 U.S.C. §§ 2241 through 2254. They are reproduced at App. 57a-69a because of their length.

INTRODUCTION

Heck v. Humphrey's core holding is easily articulated—a state prisoner may not advance a claim under 42 U.S.C. § 1983 where success on that claim "would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." 512 U.S. 477, 487 (1994). This seemingly straightforward language, however, has been the source of ongoing and ever-increasing confusion among the lower courts. Perhaps nowhere is this confusion more apparent than with regard to *Heck*'s application to claims, such as those at issue here, that involve challenges under § 1983 to parole procedures. In the words of the court below, "the cases from the lower courts are anything but clear, and the rulings from the various circuits are not entirely consistent." *Dotson v. Wilkinson*, 329 F.3d 463, 468 (6th Cir. 2003). This case presents an ideal vehicle for providing clarity on that issue.

Certiorari is warranted for three reasons. First, as alluded to above, the circuits are in direct conflict on this important and frequently recurring issue. Some courts, including the court below, hold that *Heck* does not bar § 1983 claims challenging parole procedures where success will have only a probabilistic impact on the duration of confinement (*e.g.*, by resulting in a new parole hearing where parole may, or may not, be granted). According to these courts, *Heck* is instead limited to those claims that, if successful, "will inevitably or automatically result in earlier release." *Id.* at 471. Other courts reject this limitation, holding that because such claims—even if they seek only a new hearing—necessarily question the validity of the parole board's action, *Heck* bars *any* § 1983 claim predicated on "a challenge to the procedures used in the denial of parole." *Butterfield v. Bail*, 120 F.3d 1023, 1024 (9th Cir. 1997).

Eight of the twelve circuits have weighed in on the issue in some form, and only this Court can provide a uniform reading of the appropriate reach of *Heck*'s bar on § 1983 claims challenging parole proceedings.

Nor can anyone doubt that this is a frequently-recurring issue. Indeed, it lies at the very heart of "the intersection of the two most fertile sources of federal-court prisoner litigation— . . . 42 U.S.C. § 1983, and the federal habeas corpus statute, 28 U.S.C. § 2254." *Heck*, 512 U.S. at 480. The high volume of potential traffic at this crossroads—there are over 1.2 million inmates in State correctional facilities nationwide and many, if not most, will become eligible for parole at some point during their sentence[1]—increases the need for clear signals as to which claims fall under § 1983, and which must go to habeas.

Second, certiorari is warranted because the decision below directly conflicts with this Court's precedent, and, in doing so, undermines important State sovereignty interests. Neither *Heck* nor *Edwards v. Balisok*, 520 U.S. 641 (1997), imposes the "earlier release requirement" created by the court below; in fact, both opinions are flatly inconsistent with it. Imposing this unwarranted limitation here is particularly troubling because decisions regarding whom to incarcerate, and for how long, go to the core of the State's interest in protecting its citizens from criminal activity. The decision below, by reading *Heck* and *Edwards* to bar only those suits that "'necessarily imply' that the prisoner should be released immediately or sooner than he would have been" incorrectly increases the prospect that federal oversight of state parole procedures will occur through § 1983, rather than through the more deferential vehicle of habeas. *See Dotson*, 329 F.3d at

[1] *See* Paige M. Harrison and Allen J. Beck, "Prisoners in 2002," U.S. Department of Justice, Bureau of Justice Statistics Bulletin (July 2003) (available at http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf).

471. By accepting review, this Court could correct the lower courts' improper reading of *Heck* and *Edwards*, thereby vindicating the State's important sovereignty interest in its parole decisions.

Finally, this case would permit the Court to provide additional, and much needed, guidance on what *Heck* meant by "necessarily imply the invalidity" of a conviction or sentencing decision. This language has spawned circuit splits on a variety of issues. Review here would necessarily include consideration of that language, and accordingly, the Court's resolution would materially assist the circuits in resolving these other issues.

STATEMENT OF THE CASE

This petition stems from an *en banc* decision of the Sixth Circuit allowing two inmates in state prisons to proceed with § 1983 challenges to parole proceedings.

A. Dotson's claim

Dotson was convicted in Ohio in 1981 of aggravated murder, and sentenced to life in prison. He is currently incarcerated on that sentence.

Under the parole regulations in effect when he was sentenced, Dotson was first eligible for parole after about fifteen years, *i.e.*, in 1995. He was denied parole, and under the then-relevant rules, he was scheduled for a new hearing in ten years (in 2005), with a halfway point evaluation in five years (in 2000). However, in 1998, the Ohio Adult Parole Authority revised its guidelines, and under the new rules, prisoners convicted of aggravated murder, with the risk factors found in Dotson's history, would generally be denied parole until serving at least thirty-two years. At Dotson's halfway review, he was informed that the new rules would

apply to him, so that he would likely not be paroled until at least 2007. He remained scheduled for a hearing in 2005, however.

After his halfway review, Dotson sued in federal district court under § 1983, claiming that the Parole Board violated his rights when it decided that the new guidelines applied to him. Dotson sought as relief a declaration that he should have been evaluated under the old rules, contrary to the Board's decision to apply the new rules to him. He also sought a "prompt and immediate parole hearing," so that he could be re-evaluated under the old rules.

B. Johnson's claim

Johnson was convicted of aggravated robbery, and sentenced to ten to thirty years. He is currently serving that sentence.

Johnson had an initial parole hearing in April 1999. Johnson alleges that the hearing violated his rights in several ways. He claims that just one Parole Board member held the hearing, while Ohio law requires that both a Board member and a Parole Board hearing officer conduct a hearing. He also claims that he was not allowed to speak on his own behalf. And Johnson claims that the Board member denied him parole based upon prior convictions, although, he says, he was never even charged with those crimes.

Johnson filed a § 1983 claim in federal district court as well, seeking unspecified declaratory and injunctive relief. His later briefing, however, said that he sought to set aside the parole denial, and to have an immediate, new hearing, with the new hearing to be conducted differently.

C. District Court dismissals

Dotson and Johnson each asked the district court to declare their parole proceedings unconstitutional and to order new hearings. *See, e.g.*, App. 47a-56a. The district court in each case screened the prisoners' claims pursuant to 28 U.S.C. § 1915(e) and dismissed them before service. Each court concluded that the claims were barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). *Id.* at 49a-50a, 54a-55a.

D. The Sixth Circuit's Decision Below

Both Respondents filed timely *pro se* appeals under 28 U.S.C. § 1291. The Appellee waived briefing in *Dotson* and the matter was submitted for decision. Meanwhile, the court of appeals appointed counsel for *Johnson*, and his appeal was fully briefed and argued before a separate panel.

While *Johnson* was pending before a panel, the *Dotson* panel issued a published decision reversing the district court's decision in that case. *See Dotson v. Wilkinson*, 300 F.3d 661 (6th Cir. 2002), reproduced at App. 36a-46a. The panel held that *Heck* does not apply unless a prisoner's § 1983 claim would, if successful, inevitably affect the fact or duration of his confinement. *See id.* at 45a.

The full circuit then *sua sponte* ordered that *Dotson* be reheard *en banc*. It also ordered that *Johnson* and another case be consolidated with *Dotson* for *en banc* consideration. *See Goodwin v. Ghee*, 330 F.3d 446 (6th Cir. 2003). The *en banc* court then reversed both dismissals and reinstated Dotson's and Johnson's claims. In a separate opinion, an equally divided court affirmed the dismissal of a prisoner's claim in the third case, *Goodwin v. Ghee*. *See id.*

Chief Judge Martin wrote the majority opinion, joined by five other judges, while four judges dissented in

part and concurred in part. The majority first noted that "our sister circuits have struggled with application of" the *Heck* line of cases. *Dotson*, 329 F. 3d at 466. After reviewing this Court's precedents, the majority observed that "[t]he Supreme Court seems thus to have dictated how these claims can proceed, but the cases from the lower courts are anything but clear, and the rulings from the various circuits are not entirely consistent." *Id.* at 468.

The majority decided that while the exact details of Dotson's and Johnson's claims varied, they were the same in one key respect—each prisoner would gain only a new *hearing* if successful; neither would gain immediate release. *See id.* at 470. According to the court, a § 1983 claim "necessarily implies the invalidity of a prisoner's conviction or sentence" under *Heck* **only if** it "will inevitably or automatically result in an earlier release." *Id.* at 471. Thus, the majority concluded, neither claim was *Heck*-barred.

E. The Dissent

Four judges rejected that aproach, arguing that the majority's "earlier release test" contradicted both case law from the other circuits and this Court's precedent.[2] The dissent contended that *Heck* bars all claims that would "imply the invalidity of any state criminal judgments relating to the length of a prisoner's incarceration" (*i.e.*, including parole decisions), not merely those that would result in earlier release. *Id.* at 473. In particular, the dissent noted that the majority's test was inconsistent with this Court's decision in *Balisok* because the prisoner there, like Dotson and Johnson here, may have received only a new hearing if

[2] These four judges would have affirmed the dismissal of Johnson's claim. *Id.* at 472. For other reasons, however, they concurred in the reinstatement of Dotson's claim. *Id.* at 476.

he had been successful on his claims, but nonetheless, this Court had concluded his claims were *Heck*-barred. *Id.* at 474.

The dissent also noted that if the majority were correct, then almost no parole decisions would be *Heck*-barred. *Id.* at 479. Because parole is almost always a discretionary matter, in Ohio and most States, it could always be said that a new hearing would not necessarily lead to earlier release.

REASONS FOR GRANTING REVIEW

I. This case would allow the Court to resolve the longstanding confusion among lower courts as to whether *Heck*'s favorable termination requirement applies to prisoner claims challenging parole decisions and procedures.

In *Heck* and *Balisok*, this Court established a framework designed to ensure that prisoners could not use § 1983 as a vehicle for collaterally attacking State criminal convictions or sentencing decisions. *See, e.g., Heck v. Humphrey*, 512 U.S. 477, 488-489 (1994). According to these cases, when a federal court is faced with a prisoner's § 1983 claim, it must first determine how success on the claim would affect the prisoner-plaintiff's conviction and sentence. If success would "necessarily imply" the invalidity of the prisoner's conviction or sentence, the § 1983 claims are barred. *Id.* at 487. *See also Edwards v. Balisok*, 520 U.S. 641, 648 (1997) (applying *Heck* test to state prison administrative decisions).

In the nearly ten years since *Heck* (and six since *Balisok*), however, the lower courts have struggled with the application of the "necessarily implies" test. This is especially true with regard to § 1983 claims that are framed

as challenges to parole procedures. In particular, as detailed below, the circuits are plainly split on whether *Heck* applies to claims whose success would result only in a new parole hearing (and thus the possibility of parole), but would not necessarily alter the parole decision or shorten the duration of confinement.

A. Three circuits have concluded that *Heck* is limited to § 1983 claims that, if successful, would guarantee earlier release.

Of the eight circuits that have addressed the issue presented here, three of them—the *en banc* Sixth Circuit below, along with the D.C. Circuit and the Seventh Circuit in an unpublished opinion—have concluded that *Heck* applies to claims challenging parole hearings *only if* the claims, if successful, would automatically and necessarily result in speedier release. *See Dotson v. Wilkinson*, 329 F.3d 463 (6th Cir. 2003) (*en banc*); *Anyanwutaku v. Moore*, 151 F.3d 1053 (D.C. Cir. 1998); *Ferguson v. Nagel*, 34 Fed. Appx. 499 (7th Cir. 2001).

According to these courts, where the prisoner seeks only "a ticket to get back in the door of the parole board" (*i.e.*, a new discretionary parole hearing), *Heck* does not bar the § 1983 claim. *Dotson*, 329 F.3d at 471. *See also Ferguson*, 34 Fed. Appx. at 499 (because prisoner sought only new parole and disciplinary hearings, and not immediate release on parole, his claim was not barred by *Heck*). This is true, these courts assert "even though the prisoners filed their suits for the very purpose of increasing their chances of parole." *Anyanwutaku*, 151 F.3d at 1056. *But see Razzoli v. Federal Bureau of Prisons*, 230 F.3d 371 (D.C. Cir. 2000) (with regard to federal, rather than state, prisoner, *Heck* bars those claims that, if successful, would have a "probabilistic impact" on the duration of custody, including challenges to denial of parole eligibility). Accordingly, in States like Ohio,

where parole is discretionary, this effectively means that *Heck* does not bar *any* claims challenging parole proceedings. *Dotson*, 329 F.3d at 473 (Gillman, J., dissenting) (noting this effect).

B. Three other circuits have concluded that *Heck* bars § 1983 claims that merely seek a new parole hearing.

Three other circuits—the First, Eighth and Tenth—have concluded that claims challenging parole procedures are *Heck*-barred even if success on the claim would *not* necessarily result in earlier release. *McClain v. Fuseymore*, No. 97-2095, 1998 U.S. App. Lexis 8332, at *2 (1st Cir. Apr. 25, 1998); *Bass v. Mitchell*, No. 93-1414, 1995 U.S. App. Lexis 9663, at *1-*2 (8th Cir. Apr. 28, 1995); *Vann v. Oklahoma State Bureau of Investigation*, 28 Fed. Appx. 861, 864 (10th Cir. 2001); *Waekerele v. State of Oklahoma*, 37 Fed. Appx. 395 (10th Cir. 2002). Although these decisions are unreported, the Ninth Circuit has issued a reported decision reaching the same conclusion. *Butterfield v. Bail*, 120 F.3d 1023 (9th Cir. 1997). As discussed below, however, another Ninth Circuit panel has issued a reported decision reaching the opposite conclusion, further compounding the manifest confusion in the courts of appeals.

In *McClain*, the First Circuit determined that *Heck* barred a § 1983 claim predicated on, *inter alia*, state parole authorities having allegedly "miscalculat[ed] plaintiff's parole eligibility date." 1998 U.S. App. Lexis 8332 at *1. Similarly, in *Bass*, the Eighth Circuit held that *Heck* barred a prisoner's challenge to retroactive application of a law changing his parole eligibility date. In each of these cases, a decision in the prisoner's favor on the § 1983 claim would not have guaranteed earlier release, merely earlier *eligibility*, yet the courts had no difficulty concluding that the challenges fell within *Heck*'s scope.

Similarly, in *Vann*, the prisoner brought a § 1983 claim alleging that the parole file used at his hearing contained false information. 28 Fed. Appx. at 862. He did not allege that he was entitled to parole, but only that he was entitled to have the false information removed from his file for parole consideration purposes. The Tenth Circuit, however, concluded that such a claim would "necessarily cast doubt on" the earlier parole decision, thereby bringing the claim within *Balisok* (and, accordingly, *Heck*). *Id.* at 864. *See also Crow v. Penry*, 102 F.3d 1086, 1087 (10th Cir. 1996) (*Heck* "applies to [all] proceedings that call into question the fact or duration of parole or probation"); *Waeckerle*, 37 Fed. Appx. at 397 (prisoner's claim that parole investigator unjustly recommended denying parole is barred under *Heck*, even though success on the claim would presumably not entitle prisoner to parole, but only to a new hearing without the unjust recommendation). These decisions clearly conflict with the Sixth Circuit decision below.

C. Two other circuits have internal conflicts on the issue.

Finally two circuits, the Fourth and the Ninth, have issued opinions going both directions on this issue. In *Butterfield v. Bail*, for instance, the Ninth Circuit considered a prisoner's § 1983 challenge to the procedures used in making a parole eligibility decision. 120 F.3d at 1024. A determination of parole eligibility, of course, merely provides the prisoner with a parole hearing; it does not guarantee a successful outcome. Thus, the § 1983 challenge, even if successful, would not necessarily guarantee an earlier release. Nonetheless, the court had "no difficulty concluding that a challenge to the procedures used in the denial of parole

necessarily implicates the validity of the denial of parole and, therefore, the prisoner's continuing confinement." *Id.* at 1024. Indeed, according to the court:

> Few things implicate the validity of continued confinement more directly than the allegedly improper denial of parole. This is true whether that denial is alleged to be improper based upon procedural defects in the parole hearing or upon allegations that parole was improperly denied on the merits.

Id. In short, the court faced precisely the same issue presented here, but arrived at exactly the opposite conclusion.

But, in *Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997), a different panel of the Ninth Circuit reached a different result. There, the prisoners sought to advance § 1983 claims challenging new laws that required the prisoners to take certain steps (completion of sex offender treatment) as a precondition to parole eligibility. The court concluded that these claims were not barred by *Heck* because victory would provide the prisoners only "a ticket to get in the door of the parole board, thus only making them *eligible* for parole consideration according to the terms of their sentences. . . . [I]t will in no way *guarantee* parole or necessarily shorten their prison sentences by a single day." *Id.* at 824 (emphasis in original). Thus, the *Neal* court drew the same line articulated by the court below here, a line that, as discussed in Section II below, is not warranted by this Court's cases.

The Fourth Circuit is similarly conflicted. In *Husketh v. Sills*, 34 Fed. Appx. 104 n.2 (4th Cir. 2002), the court concluded that a prisoner's claim was *Heck*-barred "because his challenge of his parole eligibility implies the invalidity of his continued confinement." But in *Miller v. Jackson*, No.

94-6395, 1994 U.S. App. Lexis 26817, at *1 (4th Cir. Sept. 23, 1994), the court took a narrower view of *Heck* and *Balisok*—"because [the prisoner's] claims challenged not the right to parole, but the right to procedural due process in the consideration of parole, his complaint was properly brought in a § 1983 action." *Id.* at *2.

* * *

In sum, there is a direct conflict among published and unpublished circuit court decisions alike on the issue presented by this petition: Does *Heck* bars claims that, if successful, will result in new parole hearings, but not necessarily different parole decisions? Or does *Heck* bar only claims that, if successful, would guarantee earlier release? The published opinions alone have amply developed and sharpened the arguments on both sides of this issue so as to warrant certiorari. The various unpublished opinions only magnify the confusion among the circuit courts and provide additional justification for certiorari.

Certiorari is especially warranted by the importance of this issue to the States and the frequency with which it arises. As discussed below (*see* Section II.C), the decision whether these claims should proceed in habeas rather than § 1983 has important implications for State sovereignty. And undoubtedly, this issue will frequently recur. There are over 1.2 million prisoners being held in State correctional facilities across the country. Many of them will, at some point during their sentence, become eligible for parole. In every case challenging either a parole eligibility decision, or the procedures used in a parole hearing, the issue presented here will arise. Granting certiorari will allow the Court to prescribe a clear answer to this question, thus both ensuring that prisoners receive uniform treatment in the various

circuits on their federal constitutional claims, and allowing the lower courts to more expeditiously handle prisoner claims.

II. The Sixth Circuit decision below conflicts with *Heck* and *Edwards v. Balisok*, and it also dramatically undermines State sovereignty.

Review is also warranted because the Sixth Circuit decision below directly conflicts with this Court's decisions in both *Heck* and *Balisok*. First, as the dissent below points out, it adopts a reading of *Heck*'s "invalidation" language that rejects this Court's understanding of that term in *Balisok*. *Dotson*, 329 F.3d at 474 (Gillman, J., dissenting). Second, while there may be two plausible readings of the scope of *Heck*'s favorable termination requirement, the claims below were *Heck*-barred under either view. The court below focused solely on whether the prisoners' § 1983 claims would inevitably result in their "earlier release," a requirement found nowhere in *Heck* or its progeny. In doing so, it missed the key issue common to both readings of *Heck*—that state sentencing decisions are entitled to more deference than § 1983 provides especially when, as here, they can also be reviewed through habeas proceedings. Finally, in opening the floodgates to prisoner claims under § 1983 challenging parole procedures, the court below undermined this Court's longstanding respect for State sovereignty, namely the State's ability to monitor its own incarceration decisions.

A. The decision below adopts an interpretation of "invalidation" under *Heck* that is inconsistent with this Court's treatment of that term in *Balisok*.

Heck holds that a prisoner cannot use § 1983 to advance a claim that, if successful, would "necessarily imply

the invalidity of [a criminal] conviction or sentence." *Heck*, 512 U.S. at 487. *Balisok* establishes that "invalidating" a state decision for *Heck*'s purposes includes a federal court order resulting in a new State hearing, as the order to re-hear necessarily vacates, and thereby invalidates, the result of the prior hearing. The Sixth Circuit, however, interpreted "invalidate" to cover only those federal court orders that would require a different *result*, not those that merely would require a new *hearing*. In doing so, the Sixth Circuit, and those courts in its camp, directly conflict with this Court's precedent.

In *Balisok*, the prisoner, Edwards, sought to use § 1983 to challenge the procedures used to deprive him of good-time credits. He shaped his claim as a challenge to the *procedures*, rather than the deprivation itself, in an attempt to avoid *Heck*. This Court, however, rebuffed his claim. It noted that a "challenge to the procedures could be such as necessarily to imply the invalidity of the judgment." *Balisok*, 520 U.S. at 646. And the Court concluded that the procedural challenge there would indeed "imply the invalidity of the judgment" because:

> This is an obvious procedural defect, and state and federal courts have reinstated good-time credits (*absent a new hearing*) when established.

Id. at 647 (emphasis added). That is, the Court expressly recognized that the prisoner's success on his § 1983 claim may result only in a new hearing, and even acknowledged that the outcome of that new hearing may be the same. *Id.* Nonetheless, it concluded that the claim "necessarily impl[ied] the invalidity" of the decision at the prior State hearing. *Id.* at 649.

The court below, however, rejected this definition in favor of a much narrower understanding of "invalidity." According to the Sixth Circuit majority, those claims that, if successful, would result only in a new "ticket to the door" (*i.e.*, a new hearing) do not "imply the invalidity" of the previous ruling. *Dotson*, 329 F.3d at 471. Rather, it is only when federal court would, in effect, reverse the State decision on the merits (*e.g.*, order parole when the State had not) that the "necessarily implies" test is met. This, as the dissent pointed out, directly contradicts *Balisok*:

> Because the impact the new hearings would have on Dotson and Johnson's parole or release is indeterminate, the majority contends that the validity of the administrative judgment has not been questioned. A similar argument, however, was advanced by the petitioner in *[Balisok]* to the effect that a ruling in Edwards's favor on his § 1983 procedural attack would not necessarily imply the invalidity of the loss of his good time credits because the Washington courts could still uphold the administrative determination once the procedural error were corrected. *But the Court clearly rejected this argument in [Balisok]. Simply because the administrative body might reach the same result the second time around, therefore, does not save a § 1983 procedural attack.*

Dotson, 329 F.3d at 474 (emphasis added).

In reaching its decision, the majority below thus mirrored the D.C. Circuit's flawed reasoning in *Anyanwutaku*. Like the Sixth Circuit, that court rejected the idea that a federal court order vacating a state decision and

ordering a new hearing is enough. Rather, it reads *Balisok* "to require that a state prisoner's section 1983 claim must first be brought in habeas only when, if successful, it would 'necessarily imply' or automatically result in, *a speedier release from prison*." *Anyanwutaku*, 151 F.3d at 1056 (emphasis added). According to these courts, then, only a federal court order that would *reverse* on the merits, not merely one that orders a new hearing, trips *Heck*'s bar—a result directly at odds with this Court's opinion in *Balisok*.[3]

The failure of the Sixth Circuit, and the courts that agree with it, to follow binding Supreme Court precedent on this important and frequently-recurring issue is an independent reason justifying certiorari here.

B. Under either of the two prevailing readings of *Heck*, the claims here should have been subject to the favorable termination requirement.

In the years since *Heck* was decided, two views have emerged regarding its scope. Those readings differ on whether *Heck* applies where the prisoner has no alternate federal remedy through the habeas statute. Under either of them, however, the claims advanced here are *Heck*-barred.

The first view, referred to here as the "Literal Reading," understands *Heck's* favorable termination requirement as barring any § 1983 claim where success on

[3] The Sixth Circuit opinion directly contradicts this Court's precedent in another respect as well. According to the majority, administrative determinations do not count as "judgments" under *Heck* and *Balisok*. *See Dotson*, 329 F.3d at 470 n.2. As the dissent notes, however, this must be wrong "because [*Balisok*] itself was dealing with the judgment of an administrative body." *Id.* at 474 (Gilman, J., dissenting).

the claim would imply the invalidity of a previous conviction or sentencing decision, regardless of whether habeas corpus is available as an alternative remedy. This approach finds support in the *Heck* majority's refusal to limit its holding to cases where plaintiffs have an alternate vehicle, habeas, to challenge the criminal decision at issue. *See Heck*, 512 U.S. at 490 n.10 ("the principle barring collateral attacks . . . is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated," *i.e.*, making habeas unavailable); *see also Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (rejecting claim that released prisoner must necessarily have live habeas claim or a potential § 1983 claim, and rejecting claim that "a § 1983 claim must always and everywhere be available"). In sum, this view is not premised on whether habeas is available, but instead focuses on preventing "a collateral attack on [a] conviction through the vehicle of a civil suit." *Heck*, 512 U.S. at 484. *See, e.g., Schilling v. White*, 58 F.3d 1081, 1086 (6th Cir. 1995) ("*Heck v. Humphrey* is not based solely on the need to preserve habeas corpus as the exclusive federal remedy. In fact, *Heck* applies as much to prisoners in custody (a habeas prerequisite) as to persons no longer incarcerated.").

The second view, which we refer to as the "Appropriate Federal Remedy Reading," limits *Heck* to cases that fit textually within *both* § 1983 *and* the habeas statutes. Under this reading, a claim is *Heck*-barred under § 1983 *only if* the prisoner has habeas available as a vehicle to pursue his claim. This view is based on Justice Souter's concurrences in *Heck* and *Spencer v. Kemna*. *See Heck*, 512 U.S. at 501-02 (Souter, J. concurring); *Spencer*, 523 U.S. at 20 (Souter, J., concurring). It understands *Heck's* favorable termination requirement as merely a tool for separating those claims that should be routed through the more general provisions of § 1983 from those that should proceed under the more specific habeas statutes. *Heck*, 512 U.S. at 498-500 (Souter, J., concurring); *Spencer*, 523 U.S. at 20 (Souter, J.,

concurring). It seeks to assure the existence of some federal vehicle to advance federal claims implying the invalidity of State convictions or sentencing decisions, *Heck*, 512 U.S. at 501-502 (Souter, J., concurring); and hence would limit *Heck*'s bar to cases where such a remedy exists. *See Spencer*, 523 U.S. 20-21 (Souter, J., concurring) ("the better view, then, is that a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy."). *See also DeWalt v. Carter*, 224 F.3d 607, 617 (7th Cir. 2000) ("In this case, where habeas is not applicable, the requirements of the habeas statute do not supersede the explicit right to proceed under § 1983. Consequently, [plaintiff] may proceed with his § 1983 action without first seeking to invalidate the state court action through habeas.").

The claims presented here are *Heck*-barred under either of these readings. The claims below challenged parole denials, and such decisions are undoubtedly sentencing decisions. *See Mistretta v. United States*, 488 U.S. 361, 364-365, 366 (1988) (parole officials exercise sentencing power). *See also* A. Campbell, *The Law of Sentencing* § 4.1, p. 70, § 17.6, 450 (2d Ed. 1991). *See also* V. Palcios, *Go and Sin No More: Rationality in Release Decisions by Parole Boards*, 45 S.C.L. Rev. 567, 573, 574 (1994) ("Indeterminate sentencing systems allocate sentencing discretion to the judge and the paroling authority."). Indeed, consistent with that reality, courts routinely recognize that the denial of parole implicates a prisoner's sentence for habeas purposes. *See, e.g., Coady v. Vaughn*, 251 F.3d 480, 484-486 (3d Cir. 2001); *Sammons v. Rodgers*, 785 F.2d 1343, 1345 (5th Cir. 1986); *Kills Crow v. United States*, 555 F.2d 183, 189 n. 9 (8th Cir. 1977).

Further, the nature of the claims here is such that, if successful, they would "invalidate" the decisions at issue. Both Respondents seek new parole hearings, and, as described above, granting them that relief would "necessarily imply" the invalidity of their former hearings.

Thus, because the claims, if successful, would invalidate State sentencing decisions, they fall within the ambit of the Literal Reading. And, because the claims are cognizable in habeas, *see Coady* and *Sammons, supra,* the Appropriate Federal Remedy Reading bars them as well. In short, this decision below conflicts with the Court's decision in *Heck* under either reading, and thus certiorari is warranted.

C. Contrary to the decision below, nothing in *Heck* or *Balisok* limits the favorable termination requirement to claims that will inevitably affect the fact or duration of a prisoner's confinement.

The mere fact that Respondents' claim would not guarantee earlier release does not preclude application of *Heck*'s bar. Nothing in either *Heck* or *Balisok* limits those holdings to claims that will "inevitably or automatically result in earlier release" of the prisoner-plaintiff. *See Dotson*, 329 F.3d at 471. To the contrary, those opinions in fact mandate that *Heck's* favorable termination requirement applies regardless of whether the claim will necessarily impact the term of confinement.

Initially, neither *Heck* nor *Balisok* involved claims that would have necessarily guaranteed the plaintiffs there earlier release. Neither plaintiff requested such relief, *see, e.g., Heck*, 512 U.S. at 479, *Balisok*, 520 U.S. at 644, and nothing indicates that success on their claims would have resulted in anything more than a new trial or a rehearing, the usual result when a conviction is overturned.

More importantly, *Heck* contains several strong indicators that the favorable termination requirement applies regardless of whether the § 1983 claim would necessarily alter the term of plaintiff's confinement. *Heck* expressly stated, for instance, that the requirement applies to claims that could not possibly affect a plaintiff's confinement—those brought by a released prisoner, *Heck*, 512 U.S. at 490 n.10—a point the Sixth Circuit failed to even address.

Similarly, both the express language and internal logic of the Appropriate Federal Remedy Reading indicate that a claim's impact on a prisoner's current confinement is irrelevant to *Heck's* applicability. Justice Souter expressly rejected the proposition that "the relief sought in a § 1983 action dictates whether a state prisoner can proceed immediately to federal court," *Heck*, 512 U.S. at 497, thus making the fact that a prisoner seeks a new hearing, rather than outright release, irrelevant.

Nor can Respondents argue that the fact they are seeking a new hearing rather than release means that habeas is not an appropriate vehicle (thus making § 1983 more necessary under the Appropriate Federal Remedy Reading). After all, the remedy in habeas usually results only in a retrial or rehearing with no guaranteed result. 2 R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure*, § 33.3 (4th Ed. 2001) ("By far the most common habeas remedies today are so-called 'conditional release' orders . . . which require the state to . . . retry (or resentence) the petitioner in a constitutional manner within a 'reasonable' period of time."). That the result here would be a new hearing, then, certainly cannot rule out habeas as the appropriate choice.

Balisok further contradicts this "earlier release" requirement. As noted above, the Court in *Balisok* expressly

acknowledged that the State might provide a new hearing that would reach the same result. Yet, it held that the § 1983 claims were still *Heck*-barred. *See* Section II.A. Moreover, in that case, in addition to suing over the revocation of good time credits, the prisoner-plaintiff also challenged a 30-day placement in disciplinary segregation, a separate sanction having no impact on the length of his sentence. The trial court applied *Heck* to dismiss the entire claim, including the portion related to the segregation. *Id.* at 644. This Court sustained that action, making no distinction between the sentence-affecting portion of the prisoner's claim (good time credits) and that portion that had no impact on sentence duration (segregation). That result directly contradicts any notion that *Heck* is limited to those claims that would guarantee an earlier release. But the *Balisok* result makes perfect sense if the key point is whether success on the prisoner's § 1983 claim would invalidate the results of a State hearing.

In sum, nothing in *Heck* or *Balisok* limits *Heck's* favorable termination requirement to claims inevitably affecting the fact or duration of a prisoner's confinement. The Sixth Circuit's decision below engrafting that requirement thus conflicts with this Court's precedent.

D. The decision below undermines the longstanding policy against excessive federal interference in State processes related to the enforcement of criminal law.

Not only did the Sixth Circuit run afoul of both *Heck* and *Balisok*, but its decision also frustrates the long-standing policy underlying those decisions—the principle that State courts must be allowed the first opportunity to review constitutional claims bearing upon State prisoners' release from custody.

Heck and *Balisok* are not isolated holdings. They are merely recent examples of the "fundamental policy against federal interference with state criminal" matters. *Younger v. Harris*, 401 U.S. 37, 46 (1971). As *Younger* recounts, "the national government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states." *Id.* at 44. That policy of respect for State sovereignty also underlies the habeas requirement that State courts be afforded "a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary." *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986). *See also Rose v. Lundy*, 455 U.S. 509, 515 (1982).

The favorable termination requirement common to *Heck* and *Balisok* reflects that policy. It fosters federal respect for State sovereignty by barring prisoners' use of § 1983 to launch federal attacks on State incarceration decisions. *Heck* does so with regard to State court decisions, and *Balisok* extends the same principle to administrative decisions, an area where respect for State determinations "has as much relevance . . . as it does where state judicial actions are being attacked." *Prieser v. Rodriguez*, 411 U.S. 475, 491 (1973). *Heck* and *Balisok* therefore squarely reflect the policy of respect for State criminal decisions that underlies *Younger*, *Vasquez*, *Rose*, *Prieser* and their progeny.

This longstanding policy of federal deference to State sovereignty in the criminal arena extends not only to convictions, but also to State sentencing policies and decisions. *See Ewing v. California*, __ U.S. __, 123 S.Ct. 1179, 155 L.Ed.2d 108, 119 (2003) (noting the Court's "tradition of deference to state legislatures making and implementing" sentencing policy decisions). And, of course, parole decisions are an integral part of the criminal sentencing process. These decisions reflect the State's

difficult policy choices concerning "whether in the light of the nature of the crime, the inmate's release will minimize the gravity of the offense, weaken the deterrent impact on others, and undermine respect for the administration of justice." *Greenholz v. Inmates of the Nebraska Penal and Correction Complex*, 442 U.S. 1, 8 (1979). In making these decisions, the State must navigate the difficult straits between "encourag[ing] for its prisoners constructive future citizenship while avoiding the danger of releasing them prematurely upon society." *McGinnis v. Royster*, 410 U.S. 263, 270 (1973).

Respondents ask the federal courts to impose themselves into that process. In essence they seek a federal court order vacating a State decision that is "based upon [state officials'] experience with the difficult and sensitive task of evaluating the advisability of parole release," *Greenholz*, 442 U.S. at 10, without first giving the State an opportunity to consider the prisoners' challenges in the State's own courts. Those circuits rejecting such requests as *Heck*-barred are thus merely giving due weight to "the strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct" errors relating to the consequences of that conviction. *Prieser*, 411 U.S. at 492.

In its decision below, the Sixth Circuit ignored the carefully constructed limitations on federal court intrusion into State criminal proceedings, and thereby erred on this important issue of federalism. We respectfully urge the Court to grant certiorari to correct the lower court's misinterpretation of this binding precedent, and to protect the States' interest in overseeing their own sentencing decisions.

III. This case is an ideal companion to *Muhammad v. Close* for establishing a bright-line test for determining which prisoner claims can be brought under § 1983, which would give much-needed guidance on other issues regarding the scope of *Heck*'s favorable termination requirement that have engendered circuit splits.

In addition to resolving the specific conflict on *Heck's* affect on parole release claims, accepting this case as a companion to the recent grant of certiorari in *Muhammad v. Close*, Case No. 02-9065, *cert. granted* June 16, 2003, would provide the Court a unique opportunity to establish a general rule for determining which prisoner claims should be brought under § 1983 and which should be reviewed by habeas corpus. Moreover, it would allow the Court to provide much needed-guidance on the appropriate interpretation of *Heck*'s "necessarily implies" language, language that has fostered circuit splits on at least three other issues.

The lack of a clear rule for separating § 1983 and habeas claims has plagued the lower courts for more than three decades. Even before *Heck*, confusion reigned. *See, e.g.*, M. Schwartz, *The* Preiser *Puzzle: Continued Frustrating Conflict between the Civil Rights and Habeas Corpus Remedies for State Prisons*, 37 DePaul L. Rev. 85 (1988). And that uncertainty has, if anything, increased since *Heck*, at least with regard to the two most common types of claims frequenting "the intersection of habeas and § 1983," *Heck*, 512 U.S. at 498 (Souter, J., concurring)—those involving parole and prison disciplinary proceedings.

As described above, the circuits have taken vastly divergent approaches to parole claims. There is similar confusion regarding claims arising from prison disciplinary sanctions, with conflicting decisions among district courts, *Jenkins v. Haubert*, 179 F.3d 19, 25 (2d Cir. 1999)

(collecting cases), and between circuits, *compare Brown v. Plaut*, 131 F.3d 163, 168 (D.C. Cir. 1997), *with Huey v. Stine*, 230 F.3d 226, 230 (6th Cir. 2000), and even between different panels of individual appellate courts, *compare Stone-Bey v. Barnes*, 120 F.3d 718, 721-722 (7th Cir. 1997), *with DeWalt v. Carter*, 224 F.3d 607 (7th Cir. 2000). That confusion vexes prisoners, government defendants, trial and appellate courts across the country, generating significant satellite litigation over the procedural question of how to process substantive claims before anyone reaches the substance of those claims. Reasonable people may disagree about how to solve that problem, but all must agree that a solution is necessary.

The Court recently granted certiorari in *Muhammad v. Close*, in which it will have the opportunity to address this question in the context of prison disciplinary hearings. A grant here would allow the Court to craft a comprehensive solution for all the claims in this murky area.

Moreover, the juxtaposition of an opinion here, with that in *Muhammad*, would allow the Court to both articulate a general rule and explicate its operation in a way that both resolves the specific parole and disciplinary claims generating the most cases and provides general guidance on a number of other circuit conflicts that have arisen post-*Heck*. *See* 1B Schwartz & J. Kirklin, *Section 1983 Litigation: Claims and Defenses*, §§ 10.7, 10.8 (3d Ed. 1997) (discussing other open questions about *Heck*). Indeed, *Heck* has generated at least three other circuit splits: (1) the appropriateness of § 1983 as a means for a prisoner to obtain DNA evidence, *compare Bradley v. Pryor*, 305 F.3d 1287, 1290-1291 (11th Cir. 2002) ("we disagree with the Fourth Circuit panel that *Heck* does not permit a § 1983 suit for production of evidence for the purpose of DNA testing"), *with Harvey v. Horan*, 278 F.3d 370, 375 (4th Cir. 2002) (reaching the opposite conclusion); (2) prisoners' use of

§ 1983 to pursue Fourth Amendment unreasonable search and seizure claims, *see Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000) (noting that "[t]here is a split in the circuits as to how *Heck*'s footnote seven [dealing with 'necessarily' implies] should be interpreted" and citing decisions from the 2d, 6th, 7th, 8th, 10th and 11th Circuits); and (3) the application of *Heck* to extradition, *see Harden v. Pataki*, 320 F.3d 1289, 1299 (11th Cir. 2003) (noting that "we disagree with the Seventh Circuit's [*Heck*] analysis" in *Knowlin v. Thompson*, 207 F.3d 907 (7th Cir. 2000)). At the root of each of these conflicts is a disagreement about the scope of *Heck*'s "necessarily implies" language. Granting certiorari here would thus assist the circuits in resolving these other conflicts as well.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully urge this Court to grant certiorari and resolve the conflict regarding the appropriate scope of *Heck*'s favorable termination requirement.

Respectfully submitted,

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In The Supreme Court Of The United States

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v.

WILLIAM DWIGHT DOTSON, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-4033

William Dwight Dotson, Nos. 00-4033/4051

Plaintiff-Appellant,

v.

Reginald A. Wilkinson,

Defendant-Appellee.

No. 00-4051

Rogerico Johnson,

Plaintiff-Appellant,

v.

Margarette Ghee,

Defendant-Appellee.

Appeal from the United States District Courts

for the Northern District of Ohio

at Toledo and Youngstown.

Nos. 00-07303; 00-01075--David A. Katz and

Peter C. Economus, District Judges.

Argued and Submitted: December 11, 2002

Decided and Filed: May 19, 2003

Before: MARTIN, Chief Circuit Judge; BOGGS, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, and ROGERS, Circuit Judges.

COUNSEL

ARGUED: John Q. Lewis, JONES, DAY, REAVIS & POGUE, Cleveland, Ohio, for Appellant. Todd R. Marti, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS LITIGATION SECTION, Columbus, Ohio, for Appellees. **ON BRIEF:** John Q. Lewis, JONES, DAY, REAVIS & POGUE, Cleveland, Ohio, for Appellant. Todd R. Marti, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS LITIGATION SECTION, Columbus, Ohio, for Appellees.

MARTIN, C. J., delivered the opinion of the court, in which BOGGS, DAUGHTREY, MOORE, COLE, and CLAY, JJ., joined. GILMAN, J. (pp. 17-29), delivered a separate opinion concurring in part and dissenting in part, in which BATCHELDER, GIBBONS, and ROGERS, JJ., joined.

OPINION

BOYCE F. MARTIN, JR., Chief Circuit Judge. Rogerico Johnson and William Dwight Dotson appeal the dismissal of their individual 42 U.S.C. §1983 claims against the Ohio Adult Parole Authority. The claims asserted improprieties in the respective plaintiffs' parole proceedings. These claims were dismissed as not cognizable under section 1983, according to the rule of *Heck v. Humphrey*, 512 U.S. 477 (1994). The district courts ruled that these claims were cognizable only under a petition for habeas corpus because they necessarily implied the invalidity of the prisoners' confinement. For the following reasons, we REVERSE the judgment of the district court and find that certain prisoner claims are cognizable under section 1983.

In April of 1999, Rogerico Johnson, who was incarcerated in the state of Ohio, had an initial parole hearing. According to the Ohio Code, the parole hearing must be conducted by the Parole Board or by at least one member of the Parole Board and one Parole Board Hearing Officer. In Johnson's case, the hearing was conducted by one Parole Board member alone. At the hearing, that member of the Parole Board did not allow Johnson to speak on his own behalf, although the Code requires that she consider his oral or written statements. She did not ask Johnson any questions; Johnson was not allowed to ask any questions. The Parole Board member based her decision to deny parole on two alleged convictions for which Johnson was never even charged, in violation of the Code's permissible considerations.

Johnson claims that his due process rights were violated by this parole hearing. He filed a section 1983 claim challenging the parole hearing, not the denial of parole. He sought declaratory and injunctive relief. The district court dismissed Johnson's suit for failure to state a claim under 28 U.S.C. § 1915(e), finding that *Heck* precluded his claim. Johnson alleges that this challenge is cognizable under section 1983 and that the district court erred in dismissing his complaint.

William Dwight Dotson was convicted in Ohio in 1981 of aggravated murder. Under the regulations in place at the time, he was not eligible for parole for fifteen years. If he were denied parole at that point, the Parole Board would be required to give him another hearing within five years. Dotson was denied parole initially, and the Parole Board set his next hearing for ten years later, with a halfway point evaluation in five years. This plan complied with the regulations in effect when Dotson was sentenced.

Before that five years lapsed, however, the Ohio regulations changed, and the new parole rules said that a prisoner convicted of aggravated murder was not eligible for parole for more than thirty-two years. Dotson attended his halfway review, scheduled under the regulations in place at the time of his initial incarceration. At that review, however, the Parole Board decided the new rules applied retroactively, and the Parole Board announced that Dotson would not be eligible for parole until 2007. They nevertheless kept the 2005 date scheduled for Dotson's next hearing. The Parole Board made a determination about Dotson's parole eligibility, not about his parole suitability, as was required by the old regulations.

Dotson filed suit under section 1983, alleging violations within the parole hearing procedures. The district court

dismissed Dotson's claim, stating it was not cognizable under section 1983.

When a district court dismisses a case or claim pursuant to 28 U.S.C. § 1915(e), this court reviews such dismissal *de novo*. *McGore v. Wrigglesworth*, 114 F.3d 601, 604 (6th Cir. 1997). The grant of a motion for summary judgment is also reviewed *de novo,* and this court applies the same standard the district court applied. *See Perry v. McGinnis*, 209 F.3d 597, 600 (6th Cir. 2000).

Federal habeas corpus pursuant to 28 U.S.C. § 2254 is the exclusive avenue for challenging the fact or duration of a prisoner's confinement, but civil rights actions pursuant to 42 U.S.C. § 1983 are available to challenge the conditions of that confinement, according to the Supreme Court. *See Preiser v. Rodriguez*, 411 U.S. 475 (1973). The cases before this *en banc* court today involve the intersection of these two provisions. It is our task to determine under what circumstances a prisoner may use a section 1983 action, rather than a habeas corpus petition, to challenge the procedures used in his parole hearing.

Five somewhat confusing Supreme Court cases govern the issue here, and our sister circuits have struggled with application of their holdings. We have struggled as well, as evidenced by the conflicting opinions, mostly unpublished, of this court thus far. We now seek to clarify the conflict.

The oldest of the relevant Supreme Court cases is *Preiser*. 411 U.S. 475. In this case, prisoners challenged a policy of deprivation of good-time credits after disciplinary hearings. *Id.* at 476-82. The prisoners sought injunctive relief in the form of immediate restoration of the credits, which in every case would automatically result in the prisoners' immediate release from confinement. *Id.* at 477. Because this action challenged the duration of their confinement, the Supreme

Court held that "a state prisoner challenging his underlying conviction and sentence on federal constitutional grounds in a federal court is limited to habeas corpus." *Id.* at 489.

As explained above, however, *Preiser* left open the possibility that a section 1983 claim might still lie. The Supreme Court said, "[I]f a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release--the traditional purpose of habeas corpus." *Id.* at 494. The Court went on to say, "Accordingly, . . . a damages action by a state prisoner *could* be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies." *Id.* (emphasis added).

After imagining a prisoner's claim that might be cognizable under section 1983 in *Preiser*, the Supreme Court decided in *Wolff v. McDonnell*, 418 U.S. 539, 554-55 (1974), that a section 1983 claim for damages based on a challenge to the procedures employed by the state in imposing sanctions on a prisoner, including the loss of good-time credits for flagrant or serious misconduct, was in fact cognizable. The suit was a class action, and it issued a general challenge to the procedures employed by the state. The Court said, "[I]t was proper for the [courts] to determine the validity of the procedures for revoking good-time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already cancelled." The Court recognized the section 1983 claim.

After a long period of silence on the matter, the Court decided *Heck v. Humphrey*, 512 U.S. 477 (1994). In *Heck*, a prisoner claimed that the defendants, state prosecutors and investigators, had engaged in an unlawful investigation of

him that led to his unlawful arrest and prosecution. He sought compensatory and punitive damages but not release from custody or other injunctive relief. Nevertheless, because the Court found that Heck was actually testing the reliability and legality of his confinement, his claim was not cognizable under section 1983. *Id.* at 481-82.

The Court sought to further clarify the question, however. Citing the *Preiser* quote above, that seeking damages is not challenging one's confinement, the Supreme Court said, "That statement may not be true, however, when establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction." *Id.* at 481. The Supreme Court went on to limit the use of section 1983 for prisoner claims, stating at 486-87, that

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983.

The Court, however, then said, "[I]f the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed

to proceed, in the absence of some other bar to the suit." *Id.* at 487. The cognizable claim, then, cannot be the kind of challenge that fits squarely within the core of habeas corpus, a challenge to the fact or duration of confinement. The question becomes what the Supreme Court intends by "necessarily demonstrates," as to the validity of a conviction or sentence. *Id.* at 481.

The Supreme Court further explored that question in *Edwards v. Balisok*, 520 U.S. 641 (1997). In that case, a state prisoner claimed to challenge only the procedures used in his disciplinary proceeding, believing that he had carved out the sort of claim cognizable under section 1983, *Preiser*, and *Heck*. The procedures at issue, however, regarded the loss of good-time credits. In seeking and successfully attaining restoration of good-time credits, a prisoner's sentence was necessarily and automatically shorter. The Supreme Court held that the prisoner's narrow interpretation of a cognizable claim was not narrow enough; the nature of a challenge to procedures may still imply the invalidity of the conviction or sentence. *Id.* at 645. As a result, a claim attacking only procedure, not result, may still fail to be cognizable under section 1983 unless the prisoner can show that the conviction or sentence has been previously invalidated, where, as in *Edwards*, the challenge can be said to "necessarily" imply the invalidity of the continued confinement.

Finally and most recently, in *Spencer v. Kemna*, 523 U.S. 1 (1998), the Supreme Court reiterated that some kind of prisoner claim is cognizable under section 1983. The Court wrote, "If, for example, petitioner were to seek damages 'for using the wrong procedures, not for reaching the wrong result,'and if that procedural defect did not 'necessarily imply the invalidity of' the revocation, then *Heck* would have no application [at] all." *Id.* at 17 (internal citations omitted).

The Supreme Court seems thus to have dictated how these claims can proceed, but the cases from the lower courts are anything but clear, and the rulings from the various circuits are not entirely consistent. As explained more fully below, the District of Columbia Circuit has found that a challenge to parole proceedings is cognizable under section 1983, as has the Fifth. The Seventh Circuit recognizes that some prisoner claims are cognizable under section 1983 rather than habeas, but it is not clear where challenges to parole proceedings lie. The Tenth, the Ninth, and the Eighth Circuits have conflicting precedent.

In *Anyanwutaku v. Moore*, 151 F.3d 1053 (D.C. Cir. 1998), the Court of Appeals for the District of Columbia Circuit held that an inmate's constitutional challenge alleging miscalculation of a parole eligibility date could be brought as a section 1983 action. The court indicated that because parole decisions in the District of Columbia were discretionary, there was no guarantee the inmate would have been released any earlier. Likewise, in *Carson v. Johnson*, 112 F.3d 818, 820 (5th Cir. 1997), the court said, "Generally, section 1983 suits are the proper vehicle to attack unconstitutional conditions of confinement and prison procedures," whereas a habeas petition is the proper vehicle for seeking release from incarceration.

The Seventh Circuit recently summarized its standard in *Moran v. Sondalle*, 218 F.3d 647, 650-51 (7th Cir. 2000) (internal citations omitted), in this way:

> State prisoners who want to challenge their convictions, their sentences, or administrative orders revoking good-time credits or equivalent sentence-shortening devices, must seek habeas corpus, because they contest the fact or duration of custody. State prisoners who want to raise a constitutional challenge to any other decision, such as transfer to a new prison, administrative segregation, exclusion from prison programs, or suspension of privileges, must instead employ §1983 or another statute authorizing damages or injunctions--when the decision may be challenged at all . . . .

The question remains, however, whether a parole hearing is an "equivalent sentence-shortening device" or "any other decision" in the Seventh Circuit.

The Tenth Circuit cases are in conflict. Early Tenth Circuit cases seem to say that habeas is appropriate for claims arising from parole procedures. *See Crow v. Penry*, 102 F.3d 1086 (10th Cir. 1996). This case, however, predated *Spencer v. Kemna*. 523 U.S. 1 (1998). More recently, the Tenth Circuit has said, albeit in an unpublished opinion, "[S]ection 1983 actions are typically the proper vehicle for attacking unconstitutional conditions of confinement and parole procedures." *Woodruff v. Everett*, No. 01-8087, 2002 WL 1614233, *1 (10th Cir. July 23, 2002).

The Ninth Circuit rule distinguishes among different parole procedures. That court, in *Butterfield v. Bail*, 120 F.3d 1023, 1024 (9th Cir. 1997), said, "We have no difficulty in concluding that a challenge to the procedures used in the denial of parole necessarily implicates the validity of the denial of parole and, therefore, the prisoner's continuing confinement." As support, in Footnote 1, the court cited *Crow v. Penry*, 102 F.3d at 1087, and *McGrew v. Texas Board of Pardons & Paroles*, 47 F.3d 158, 161 (5th Cir. 1995). *Id.* The court contrasted the facts in *Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997), to the facts in *Butterfield*. In *Neal*, prisoners brought a section 1983 action to challenge

their characterization as sex offenders for purposes of a state registration program. The Ninth Circuit noted that success on the merits for the claimants would not call into question the validity of their confinement; it would merely remove them from the sex offender list and registration program requirements. *Id.* at 823-24. As a result, the prisoners' claims were properly brought under section 1983. *Id.*

Finally, the Eighth Circuit has characterized the state of the law in this way: "Claims challenging the conditions of confinement or the method by which a sentence is being carried out may be asserted through a §1983 cause of action. However, a state prisoner challenging the fact or duration of a sentence of imprisonment and seeking immediate or speedier release has a federal remedy through habeas corpus and cannot bring a claim under § 1983." *Williams v. Hopkins*, 130 F.3d 333, 335-36 (8th Cir. 1997).

As to where this Court ultimately stands on these issues, we first look to *Ward v. Engler*, Nos. 00-1867, 00-1948, 2001 WL 278683 (6th Cir. Mar. 13, 2001) (unpublished opinion). In ruling that the plaintiffs actually objected to the outcomes of their parole hearings, not the procedures of those hearings, we said, "Essentially, plaintiff's claims are not cognizable under §1983 because plaintiff cannot show that the decision to deny plaintiff consideration for parole was invalidated, and a ruling in plaintiff's favor in this case would necessarily implicate the continued validity of his imprisonment." We further have said,

> One reason which [the prisoner] gave for why his parole was improperly denied was some of the convictions used to deny his parole were invalid. As a ruling on the parole board's decision denying [him] parole would thus question the validity of these challenged

> convictions, *Heck* directs that the complaint be dismissed. Further, as [the prisoner] is contesting his actual confinement, his sole remedy is a writ of habeas corpus, not a civil rights action.

Chandler v. Michigan Parole Bd., No. 99-1119, 2000 WL 875771, *1 (6th Cir. Jun. 20, 2000) (unpublished opinion). These decisions would deny Johnson and Dotson the relief they seek.

On the other side, this court has also recognized certain prisoner parole claims under section 1983. "When a prisoner is not claiming immediate entitlement to parole, but rather is challenging parole procedures, he may bring his action under § 1983." *Coffey v. Tennessee*, No. 00-5776, 2001 WL 493400, *2 (6th Cir. May 1, 2001) (unpublished opinion); *see also Fraser v. Tenn. Bd. of Paroles*, No. 00-5166, 2000 WL 1800634, *1 (6th Cir. Nov. 30, 2000) (unpublished opinion). In *Seagroves v. Tennessee Board of Probation & Parole*, No. 01-6274, 2002 WL 1379028,*2 (6th Cir. Jun. 25, 2002) (internal citations omitted) (unpublished opinion), we said,

> The district court should not have dismissed Seagroves's complaint under *Preiser* because he is challenging the procedures used to determine his parole eligibility rather than the decision itself. *Preiser* and *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), do not bar all § 1983 challenges to parole procedures. . . . Although a prisoner cannot sue under § 1983 for immediate or speedier release, a prisoner *can* bring a § 1983 challenge to state parole procedures because the success of such a lawsuit would only

> increase the prisoner's chances of discretionary parole. . . . He seeks, not immediate or speedier release, but a new hearing utilizing what he considers the proper statutes and procedures.

As is clear, the cases from this court are in conflict. As a result, we are forced to closely evaluate Johnson's and Dotson's claims with regard to all the precedent.

The dissent would draw a distinction between procedural challenges to parole eligibility hearings, as described in Dotson's case, at which the parole board determines a date at which a prisoner will be eligible for a parole determination hearing, and parole determination hearings themselves. The Ninth Circuit has endorsed this distinction. *Compare Neal*, 131 F.3d at 824 (AThe only benefit that a victory in this case would provide [the plaintiffs] . . . is a ticket to get in the door of the parole board, thus only making them *eligible* for parole consideration according to the terms of their sentences") (emphasis added), *with Butterfield*, 120 F.3d at 1024 (finding action alleging violation of due process rights where parole board considered false information directly and necessarily implicates the validity of the denial of parole and, therefore, prisoner's continuing confinement). While it is not clear from the record that Dotson was supposed to receive a parole eligibility hearing as opposed to a parole determination or suitability hearing, we agree with the dissent that procedural challenges to parole eligibility hearings will rarely, if ever, "necessarily imply" the invalidity of a prisoner's conviction or continued confinement. *See Neal*, 131 F.3d at 824 (observing that prisonerɔs challenges to parole eligibility determinations, if successful, would not "necessarily shorten their prison sentences by a single day"). We differ with the dissent, however, as to Johnson, because we believe that there also may exist procedural challenges to parole

determination or suitability hearings that will likewise not "necessarily imply" the invalidity of a prisonerɔs conviction or continued confinement.

Although Dotson challenges a parole eligibility determination and Johnson a parole release determination, the success of either challenge would result in a new hearing that would follow the appropriate procedures under Ohio law. Under Ohio law, parole is discretionary. *See* Ohio Rev. Code Ann. § 2967.03 (2002); Ohio Admin. Code §§ 5120: 1-1-07(B), (C). As the Supreme Court of Ohio said, in *State ex rel. Blake v. Shoemaker*, 446 N.E.2d 169, 170 (Ohio 1983), the Ohio parole statute Ais a grant of discretion; it does not create any presumption that parole will be issued and does not create an expectancy of parole . . . ." Therefore, the impact the new hearings would have on Dotson and Johnson's parole or release is indeterminate. Because the ultimate impact of these new hearings on the validity of Dotson or Johnson's continued confinement is unclear, we cannot say that a successful section 1983 action that simply results in a new discretionary parole hearing "necessarily implies" the invalidity of either plaintiff's conviction or sentence.

A successful challenge will only "necessarily imply" the invalidity of a prisoner's conviction or sentence if it will inevitably or automatically result in earlier release. A challenge to the loss of good-time credits is an example of such a challenge. *Edwards*, 520 U.S. at 647. This determination will depend upon the facts of the particular case. However, where the ultimate parole determination is discretionary and based on a host of factors, as it is in Ohio, it will be difficult to predict any highly likely or inevitable consequence of the parole determination hearing. Here, neither of the inmates' release is necessarily at issue, nor do these challenges call into question the duration or fact of

either prisoner's confinement. In *Anyanwutaku*,151 F.3d at 1055-1056, the D.C. Circuit said,

> Although Anyanwutaku would have been eligible for parole at an earlier date had he prevailed on his claims in the district court, because D.C. parole decisions are entirely discretionary . . . there is no guarantee that he would have been released any earlier. Interpreting *Preiser*, a majority of our sister circuits have held that challenges to state parole procedures whose success would not necessarily result in immediate or speedier release need not be brought in habeas corpus, even though the prisoners filed their suits for the very purpose of increasing their chances of parole.

Dotson and Johnson merely request an opportunity for a fair and untainted parole hearing.

Dotson's challenge to the procedures used to determine the date upon which he will be considered for parole, if successful, would not "necessarily imply" the invalidity of his continued confinement. Rather, success on this challenge would simply provide Dotson with a discretionary parole hearing at which the Parole Board would determine whether parole was appropriate in his case.

Similarly, the consequence of a successful procedural challenge by Johnson will be a new discretionary parole hearing. Like Dotson, Johnson simply seeks a ticket to get back in the door of the parole board. It is unclear what the ultimate result of Johnson's new parole hearing would be. Johnson claims that the Parole Board violated due process when it failed to follow Ohio law governing parole determinations by, among other things, having an insufficient

number of Parole Board members at Johnson's hearing and not giving Johnson an opportunity to speak. Thus, should Johnson succeed on this claim, he would simply receive a new hearing at which the Parole Board would follow properly the procedures as set forth under Ohio law. Not every procedural defect necessarily has an impact on the ultimate outcome of a procedurally defective hearing. The remedying of many procedural defects will not cause any different outcome at all, much less "necessarily imply" that the prisoner should be released immediately or sooner than he would have been released absent the challenge. In any event, under Ohio law, the broad discretion afforded to the Parole Board leaves us with little ability to predict what will "necessarily" occur as a result of Johnson's new parole hearing.

Further, as the District of Columbia Circuit pointed out, citing *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), "Even the Supreme Court reached the merits of a section 1983 claim by state prisoners alleging due process violations in the consideration of their suitability for parole without first addressing whether *Preiser* required the claim to be brought in habeas." *Anyanwutaku*,151 F.3d at 1056. We see no reason to require that Johnson and Dotson's claims be lodged as a general challenge in a class action suit, rather than a particularized challenge to procedures as applied, especially where neither prisoner's challenge will necessarily result in his earlier release.

Thus, where a prisoner does not claim immediate entitlement to parole or seek a shorter sentence but instead lodges a challenge to the procedures used during the parole process as generally improper or improper as applied in his case, and that challenge will at best result in a new discretionary hearing the outcome of which cannot be

predicted, we hold such a challenge cognizable under section 1983.

In conclusion, an incarcerated person obviously seeks to be released from confinement. A prisoner cares not a whit as to how that happens, but this court must care. We do not read into a legal claim what we know on a human level is realistically there: a prisoner who objects to his confinement may nevertheless raise a section 1983 claim, a legal claim, if his due process rights have been violated and the challenge does not *necessarily* implicate the invalidity of his continued confinement. Johnson and Dotson are not requesting that the parole board make a different decision, although we understand that they wish it would; they are merely requiring that the parole board comply with the law in making that decision.

We hold that procedural challenges to parole eligibility and parole suitability determinations such as those made by Dotson and Johnson do not "necessarily imply" the invalidity of the prisoner's conviction or sentence and, therefore, may appropriately be brought as civil rights actions, under 42 U.S.C. § 1983, rather than pursuant to an application for habeas corpus. To the extent that our prior opinions are in conflict with our reasoning expressed today, they are overruled. For the foregoing reasons, we REVERSE the district court as to Johnson and Dotson.

CONCURRING IN PART, DISSENTING IN PART

RONALD LEE GILMAN, Circuit Judge, concurring in part and dissenting in part. I believe that the majority opinion has adopted an overly broad "earlier release" test that

conflates the distinct factual issues presented by these two appeals, thereby confusing the already complicated area of law at the intersection of habeas corpus and 42 U.S.C. § 1983. *See Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) ("[T]he demarcation line between civil rights actions and habeas petitions is not always clear."). *Heck's* basic test of "whether a judgment in favor of the plaintiff would necessarily imply the invalidity of [the prisoner's] conviction or sentence," *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), suggests that prisoner § 1983 actions must be examined on a case-by-case basis in order to determine whether the plaintiff has a cognizable claim. The *Heck* test was further refined by *Edwards v. Balisok*, 520 U.S. 641 (1997), which addresses "the possibility, clearly envisioned by *Heck*, that the nature of the challenge to the procedures could be such as necessarily to imply the invalidity of the judgment." *Id.* at 645.

In its holding, the majority opinion focuses on whether a § 1983 claim will necessarily shorten a prisoner's time in jail. The majority thus glosses over what I believe is the Supreme Court's actual rule--that it is the *judgment* of the administrative body (in this case, the parole board) whose validity may not be questioned by a § 1983 action, regardless of the judgment's effect on the length of the prisoner's underlying conviction or sentence. Because Ohio's parole system is discretionary, the majority opinion reasons, no § 1983 claim resulting in a new hearing will necessarily imply the invalidity of the underlying conviction or sentence. (Maj. Op. at 12-13)

The majority opinion's "earlier release" test, in my opinion, fails to properly distinguish between the distinct natures of Dotson's and Johnson's challenges to Ohio's parole procedures. I believe that Dotson's claim may proceed under § 1983, but that Johnson's claim may not. Set forth below is my analysis of how I believe the test developed by the

Supreme Court from *Presier v. Rodriguez*, 411 U.S. 475 (1973), through *Spencer v. Kemna*, 523 U.S. 1 (1998), should be applied to their respective claims.

I. DOTSON'S CLAIM

A. Factual and procedural background

Dotson challenges the retroactive application of Ohio's parole-eligibility guidelines to his sentence. He was sentenced in July of 1981 to life imprisonment for aggravated murder. Dotson alleges that, at the time of his conviction, Ohio Revised Code § 2967.13(B) provided that prisoners serving a life sentence were eligible for parole after 15 years. Pursuant to the parole-eligibility statute and regulations, Dotson received his first parole hearing in 1995. He was denied parole, and the Board scheduled a second hearing for June of 2005, with a halfway review in March of 2000. On March 1, 1998, the Ohio Parole Board adopted new guidelines to assist the Board in determining whether to grant or deny parole in future hearings. The new guidelines weigh the seriousness of the offense committed, as well as the inmate's criminal history and risk to society, to provide a range of months that must be served before the inmate becomes eligible for parole release.

Dotson alleges that, at his halfway review in March of 2000, the Parole Board retroactively applied the new guidelines to determine his parole eligibility. As a result, the Parole Board noted that Dotson would still be seven years short of parole eligibility under the new guidelines at the time of his next scheduled hearing in 2005.

B. Analysis

1. Heck *and* Edwards *forbid § 1983 actions that question the validity of a state judgment determining whether a prisoner should be released on parole*

In its analysis of both Dotson's and Johnson's claims, the majority opinion adopts an "earlier release" test in holding that all attacks on parole procedures in Ohio are cognizable under § 1983 as long as they do not necessarily imply the invalidity of a prisoner's conviction or confinement by inevitably or automatically resulting in earlier release. (Maj. Op. at 13) I believe that the majority opinion's test is contrary to the holdings of *Heck* and *Edwards*. In *Heck*, the Supreme Court held that "if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal *judgment* against the plaintiff, the action should be allowed to proceed . . . ." *Heck*, 512 U.S. at 477 (second emphasis added). The Court was suggesting that the real problem was not that the prisoner's § 1983 action would necessarily get him out of jail sooner, but rather that the federal courts must not allow the use of § 1983 to imply the invalidity of *any* state criminal judgments relating to the length of a prisoner's incarceration.

In *Edwards*, the Supreme Court extended this principle when outlining the effect of correcting the procedural defect in question. The Court stated: "This is an obvious procedural defect, and state and federal courts have reinstated good-time credits (*absent a new hearing*) when it is established." *Edwards*, 520 U.S. at 647 (emphasis added). In other words, it is the implied invalidity of the administrative hearing itself--that can be corrected only by a new hearing--that is an impermissible result of a § 1983 claim.

Finally, the Court's statement in *Spencer* that a § 1983 action might lie if the "procedural defect did not necessarily imply the invalidity of the [parole] revocation . . . ." *Spencer*, 523 U.S. at 17 (internal quotation marks omitted), is not inconsistent with the holdings in *Edwards* and *Heck*. The Court gave no indication of any departure from its earlier cases to the effect that a decision to revoke parole, whether or not procedurally defective, must not be rendered invalid by the federal courts.

In attempting to avoid the rationale of the *Heck* and *Edwards* decisions, the majority opinion places great weight on the discretionary nature of Ohio's parole system. Because "the impact the new hearings would have on Dotson and Johnson's parole or release is indeterminate," the majority contends that the validity of the administrative judgment has not been questioned. (Maj. Op. at 13) A similar argument, however, was advanced by the petitioner in *Edwards* to the effect that a ruling in Edwards's favor on his § 1983 procedural attack would not necessarily imply the invalidity of the loss of his good-time credits because the Washington courts could still uphold the administrative determination once the procedural errors were corrected. *Edwards*, 520 U.S. at 647. But the Court clearly rejected this argument in *Edwards*. *Id.* at 648. Simply because the administrative body might reach the same result the second time around, therefore, does not save a § 1983 procedural attack. Furthermore, the majority believes that the Supreme Court's use of the word "'judgment' properly refers only to the decision of a convicting court." (Maj. Op. at 12, n. 2) I disagree, however, because *Edwards* itself was dealing with the judgment of an administrative body. *Edwards*, 520 U.S. at 645.

2. The 2000 halfway review did not grant or deny parole

The place to begin analyzing the nature of Dotson's claim and its legal implications is to look at the kind of proceeding that he challenges. At issue in his complaint are the actions taken at his halfway review in March of 2000. This proceeding did not result in Dotson being either granted or denied parole. Without removing his scheduled 2005 parole-determination hearing from the calendar, the Parole Board instead decided to retroactively apply Ohio's new eligibility guidelines to Dotson. Dotson's complaint does nothing more than challenge this interim action. Although the Supreme Court has never dealt with this parole-eligibility/parole-determination distinction, both the Ninth and District of Columbia Circuits have.

3. The Ninth and D.C. Circuit decisions on parole eligibility

In erroneously lumping together both Johnson's and Dotson's claims under the broad rubric of a challenge to "parole procedures," I believe that the majority has adopted a broad-based rule that was rejected by the Supreme Court in *Edwards*. A more narrow reading of *Anyanwutaku v. Moore*, 151 F.3d 1053 (D.C. Cir. 1998), analyzed in conjunction with two earlier Ninth Circuit cases, leads to what I believe is the proper rule in determining which parole challenges are cognizable in § 1983 actions.

One of these cases is *Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997), where the Ninth Circuit held that parole-eligibility determinations are decisions that can be challenged in a § 1983 claim without running afoul of *Heck* and *Edwards*. Analogous to the case before us, *Neal* dealt with the retroactive application of a sex-offender statute that

established new parole-eligibility guidelines after parole eligibility had already been determined for the two inmates in question. Following their convictions on charges of kidnapping, sexual assault, and attempted rape, Hawaii enacted the Sex Offender Treatment Program (SOTP). The program requires inmates categorized as sex offenders to participate in the program as a precondition to becoming eligible for parole. Because Neal's and Martinez's convictions took place before SOTP was instituted, the date of their parole eligibility had already been determined under older guidelines. *Id.* at 821-23.

The Ninth Circuit held that their action was cognizable under § 1983, employing the language quoted by both the majority opinion here and the D.C. Circuit in *Anyanwutaku*: "The only benefit that a victory in this case would provide Neal and Martinez, besides the possibility of monetary damages, is a ticket to get in the door of the parole board, thus only making them *eligible* for parole consideration according to the terms of their sentences." *Id.* at 824 (emphasis in original). In other words, there was no determination to be unwound by the Parole Board in *Neal* because there had never been a decision on how much of the two inmates' sentences would be served. Deciding that a parole-eligibility statute should not be retroactively applied to them "would not alter the calculus for the review of parole requests in any way." *Id.* The decision in *Neal* did not necessarily imply the invalidity of any prior judgment because no parole decision was thrown out or altered by the court.

In reaching the decision in *Neal*, the Ninth Circuit distinguished one of its earlier cases that had applied the *Heck/Edwards* test. The earlier case was *Butterfield v. Bail*, 120 F.3d 1023 (9th Cir. 1997), which held that a prisoner's due process challenge under § 1983, attacking the procedures

used by the Parole Board in denying him parole, was not sustainable. *Butterfield* closely tracked the reasoning of *Edwards* and held that "a challenge to the procedures used in the denial of parole necessarily implicates the validity of the denial of parole and, therefore, the prisoner's continuing confinement." *Id.* at 1024.

The differing outcomes in *Neal* and *Butterfield*, based upon the nature of the claims presented, is important because it parallels the distinction between the two cases at hand. Johnson, whose claim is discussed in Part II below, has challenged the procedures used in a hearing that denied him parole. Although he seeks to characterize his claim as one requesting that a future hearing by the Parole Board be untainted by procedural defects, he is necessarily implying the invalidity of the challenged hearing. Dotson, in contrast, does not challenge the procedures used in a hearing that denied him parole. Rather, like the plaintiffs in *Neal*, he challenges the retroactive application of parole-eligibility guidelines to himself. I find this distinction as articulated by the Ninth Circuit to be persuasive.

Anyanwutaku also addresses a parole-eligibility situation and employs the reasoning of *Neal*. In *Anyanwutaku*, the D.C. Circuit held that the alleged miscalculation of a parole-eligibility date presented a cognizable § 1983 claim. The opinion, however, does not differentiate between a challenge to the procedures used in a particular parole hearing to deny parole versus the misapplication or retroactive application of generally applicable parole-eligibility guidelines. *Anyanwutaku* is instead based, like the majority opinion, on the rationale that a § 1983 claim is sustainable so long as the claim does not necessarily imply or automatically result in a speedier release from prison. *Anyanwutaku*, 151 F.3d at 1056.

Because *Anyanwutaku* dealt with the alleged misapplication of parole-eligibility guidelines, however, I do not disagree with the result reached in that case, even though I disagree with its rationale. I also believe that the Ninth Circuit's treatment of the issue is more instructive than that of *Anyanwutaku* because the *Neal* and *Butterfield* decisions explicate the key difference between a parole-eligibility challenge that attacks a generally applicable prison regulation versus an attempt to "set aside" or "reverse" the denial of parole in an individual case.

4. Parole-eligibility actions under § 1983 meet the* Heck/Edwards *test

I believe that the principles set forth in *Heck* and *Edwards*, as applied by the Ninth Circuit in *Neal* and *Butterfield*, provide a reasonable framework for analyzing Dotson's claim. The nature of Dotson's claim—an attack on the retroactive applicability of Ohio's statutory parole-eligibility scheme—does not necessarily imply the invalidity of any judgment by an administrative body that he is or is not entitled to parole. In order to reach this conclusion, one simply needs to consider what will happen if Dotson's action is successful. *Heck*, 512 U.S. at 487 (noting that "if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed") (emphasis omitted). His scheduled 2005 parole hearing would proceed as planned, and nothing about the Parole Board's 1995 denial of his parole would change. A successful outcome would simply dictate that the 2005 hearing actually function as a real parole hearing, rather than as a rubberstamp denial rooted in the retroactive application of the current eligibility guidelines.

I believe that this is what is meant by the language "a ticket to get in the door of the parole board." *Neal*, 131 F.3d at 824. The Supreme Court has never addressed a situation like the one presented here, but its cases clearly indicate that there are some attacks on parole procedures that remain cognizable under § 1983. After all, the Court was very careful in *Heck* to distinguish *Wolff v. McDonnell*, 418 U.S. 539 (1974), a § 1983 class-action suit brought by prisoners challenging several of a Nebraska prison's administrative rules, practices, and procedures, on the following grounds:

> [W]e think [*Wolff*] recognized a § 1983 claim for using the wrong procedures, not for reaching the wrong result (*i.e.*, denying good-time credits). Nor is there any indication in the opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits. Thus, the claim at issue in *Wolff* did *not* call into question the lawfulness of the plaintiff's continuing confinement.

Heck, 512 U.S. at 482-83 (emphasis in original).

Similarly, there is no indication that Dotson's claim, if allowed to proceed, would vitiate the earlier denial of parole. His appeal is a classic "claim for using the wrong procedures, not for reaching the wrong result." *Id.* Further support for this conclusion comes from the fact that Dotson's lawsuit could just as easily have been cast as a class-action claim challenging the retroactive applicability of Ohio's parole-eligibility guidelines. This would have placed the case in the same posture as that presented in *Wolff*, requesting prospective injunctive relief that seems clearly permissible under the Supreme Court's rule.

Dotson's claim also brings to mind the examples of hypothetical Parole Board decisions rhetorically used by Johnson's lawyers in their Reply Brief to point out the need for the availability of § 1983 actions:

> Can the Ohio Parole Board determine that all white males who are eligible for parole release will have their release granted, while no one else can? Can the Board deny parole to all Hispanic inmates as a matter of policy? Can the Board flip a coin to determine who gets parole?

I think the answer to these questions is clearly no, with the examples illustrating why *all* § 1983 actions attacking a state's parole scheme are not subject to the habeas-corpus-exhaustion-of-state-remedies requirement. *See Preiser*, 411 U.S. at 494 (barring claims that sought the restoration of good-time credits under § 1983, but acknowledging a possible situation--an action for damages only--that "could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies"). These actions would have no necessary bearing on a particular past judgment with regard to a prisoner, but they would ensure that the states are not violating prisoners' basic federal rights.

5. A proper application of the* Heck/Edwards *test coincides with the majority's decision on Dotson's claim

The majority opinion purports to apply the *Heck/Edwards* test by simply giving Dotson and Johnson a "ticket to get in the door of the parole board." However, the opinion overreaches when it suggests that, because Johnson's and Dotson's procedural challenges will result in nothing more than a new hearing, their claims must be allowed to proceed. (Maj. Op. at 14-15) This ruling is overbroad in light of the

Supreme Court's holding in *Edwards*, which rejected the Ninth Circuit's decision based on that circuit's "precedent to the effect that a claim challenging only the procedures employed in a disciplinary hearing is always cognizable under § 1983." *Edwards*, 520 U.S. at 645. "That principle is incorrect, since it disregards the possibility, clearly envisioned by *Heck*, that the nature of the challenge to the procedures could be such as necessarily to imply the invalidity of the judgment." *Id.* In light of *Edwards*, I believe that the majority has erred in ruling that all attacks on parole procedures in Ohio that require a new hearing to correct are cognizable under § 1983.

That being said, I believe that the majority has reached the correct conclusion in allowing Dotson's claim to proceed under § 1983. I therefore concur in the result only.

II. JOHNSON'S CLAIM

A. Factual and procedural background

As indicated above, Johnson's claim involves very different facts from Dotson's. In Ohio, on or about the date of parole eligibility, the Parole Board must hold a hearing to determine whether the prisoner should be paroled. Ohio Admin. Code § 5120:1-1-10. Recommendations for or against release can be made by "a panel consisting of one or more members of the Parole Board and one or more Parole Board hearing officers." *Id.* § 5120:1-1-11(C). At the hearing, the Parole Board (or the recommending panel) shall consider, among other things, "[w]ritten or oral statements by the inmate, other than grievances filed under rule 5120-9-31 of the Administrative Code." *Id.* § 5120:1-1-07(B)(7).

Johnson alleges that these procedures were not followed at his April 9, 1999 parole hearing when he was denied parole. He alleges that, in violation of Ohio Administrative

Code § 5120:1-1-11(C), his hearing panel consisted of only one Parole Board hearing officer, rather than a panel consisting of at least one member of the Parole Board and at least one Parole Board hearing officer. Secondly, he alleges that, in violation of Ohio Administrative Code § 5120:1-1-07(B)(7), he was not allowed to speak on his own behalf or ask any questions. Finally, Johnson contends that the hearing panel's decision incorrectly relied upon two alleged convictions in his record for aggravated arson in deciding to deny his parole.

That last phrase--"deciding to deny his parole"--immediately indicates why Johnson's claim is different from Dotson's, and why it must be analyzed differently under *Heck* and *Edwards*. Johnson's § 1983 action was dismissed by the district court for failing to state a claim upon which relief can be granted. His counsel now argues on appeal that his claim is not barred by *Heck* because he "challenges only the procedures that were used at his parole hearing and seeks to have the hearing redone in a way that complies with the safeguards afforded him."

B. Analysis

In holding that Johnson can pursue his claim under § 1983, the majority opinion employs its "earlier-release" test to create a broad rule that allows § 1983 attacks on all discretionary Parole Board hearing procedures. As discussed above, this is impermissible under *Edwards*. Only if Johnson's claim were analogous to that in *Wolff* should he be allowed to pursue his action under § 1983.

Wolff was a class action that challenged the rules, practices, and procedures at a Nebraska prison complex. The plaintiffs, in their suit for damages, alleged that the policies of the prison administration were flawed as a whole, not as applied to any one inmate. *Wolff*, 418 U.S. at 553-54. This

action was held to be a cognizable § 1983 action and was later distinguished by the Supreme Court in *Heck* on the grounds quoted in the discussion of Dotson's claim under Part I above. Furthermore, the injunctive relief sought in *Wolff* was strictly prospective, and thus did not affect the validity of any judgment that had already occurred, even though the procedural changes sought by the plaintiffs would have clearly implied that past adjudications did not pass constitutional muster. *Id.* at 573.

If Johnson's complaint could be construed as a broadly conceived attack on the practices, policies, and procedures used by the Ohio parole authorities, then a plausible argument could be made that his claim, too, should proceed under § 1983. If Johnson had sought prospective relief only and did not necessarily suggest that the irregularities in his parole hearing were unique to him, then his action would not affect the validity of any judgment that had already occurred, even though the procedural changes sought would imply that the past adjudication did not pass constitutional muster.

But this characterization is not a valid one for Johnson's claim. Although Johnson's pro se complaint itself is ambiguous, his attorneys on appeal have clearly stated that he wants to have his hearing "redone." In other words, he seeks to have this court throw out the previous Parole Board's determination that denied him parole. Johnson cannot possibly be making a *Wolff*-type claim based on the relief he seeks. Furthermore, the procedural irregularities that he complains about are not problems with the practices of the Ohio Parole Board as a whole; they are deviations from the Administrative Code that allegedly took place in Johnson's hearing. For these reasons, there is no way to characterize the nature of Johnson's challenge as anything other than a claim that necessarily implies the invalidity of a prior state judgment. As discussed above, it is not the fact of the

prisoner's incarceration that is the concern, it is the very judgment of the state--administrative or judicial--whose invalidity may not be implied by a § 1983 claim.

I thus conclude that the majority has reached the wrong result in Johnson's appeal. It has done so by allowing § 1983 to be used as a vehicle for all procedural attacks on Parole Board proceedings that result in a new hearing, a result that is contrary to Supreme Court precedent. I therefore respectfully dissent from the result reached on Johnson's claim.

III. CONCLUSION

I disagree with the majority's conclusion that a "successful challenge will only 'necessarily imply' the invalidity of a prisoner's conviction or confinement if it will inevitably or automatically result in earlier release." (Maj. Op. at 13) Rather, the issue is whether the nature of the claims of the individual prisoners necessarily implies the invalidity of their underlying convictions or sentences. Because Dotson presents what amounts to a prospective attack on the retroactive applicability of Ohio's parole-eligibility guidelines, I believe that he has a cognizable § 1983 claim. Johnson, on the other hand, attacks the procedures used in a previous hearing that denied him parole, and asks that his hearing be "redone." Vacating the old hearing and ordering the Ohio Parole Board to provide Johnson with a new error-free hearing is the very type of attack on an underlying sentence that *Heck* and *Edwards* expressly prohibit. Johnson's challenge instead requires the exhaustion of state remedies and, if necessary, a petition for habeas corpus relief. *Heck*, 512 U.S. at 481. I therefore concur in the result reached on Dotson's claim and respectfully dissent with regard to Johnson's.

Footnotes

1 While this court limits the precedential value and citation to its unpublished cases, we feel it is important here to elucidate the confusion among panels of this court on the issues before the *en banc* court. The myriad unpublished cases on this issue and the differing results therein merit mention and clarification.

2 The majority finds it important to note that the Supreme Court cases establishing the precedent for this case refer to necessarily implying the invalidity of the "conviction," "sentence," or "judgment." *See Heck*, 512 U.S. at 487 ("conviction or sentence"); *see also Edwards*, 520 U.S. at 645 ("judgment"). The dissent, nevertheless, extends the rule of those cases. The dissent refers to necessarily implying the invalidity of the "hearing" and the "judgment," where "judgment" refers to a decision of the Ohio Parole Board. (Dis. Op. at 17, 22, 28) For the purposes of this case, the majority believes "judgment" properly refers only to the decision of a convicting court.

3 This is the clearest statement of the standard the majority intends to establish today. The dissent repeatedly oversimplifies this standard, stating, "Because Ohio's parole system is discretionary, the majority opinion reasons, no § 1983 claim resulting in a new hearing will necessarily imply the invalidity of the underlying conviction or sentence" (Dis. Op. at 17) and "the majority has erred in ruling that all attacks on parole procedures in Ohio that require a new hearing to correct are cognizable under § 1983" (Dis. Op. at 26). The dissent fails to acknowledge the majority's recognition that certain section 1983 claims, those that automatically result in earlier release, will never be cognizable under current Supreme Court precedent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

William Dwight Dotson,

Plaintiff-Appellant,

v. No. 00-4033

Reginald A. Wilkinson, Director;

John Kinkela; and Margarette T. Ghee,

Defendants-Appellees.

Appeal from the United States District Court

for the Northern District of Ohio at Toledo.

No. 00-07303--David A. Katz, District Judge.

Submitted: April 25, 2002

Decided and Filed: August 12, 2002

Before: RYAN, BOGGS, and COLE, Circuit Judges.

COUNSEL

ON BRIEF: William Dwight Dotson, Lima, Ohio, pro se.

RYAN, J., delivered the opinion of the court, in which BOGGS, J., joined. COLE, J. (p. 10), delivered a separate concurring opinion.

OPINION

RYAN, Circuit Judge. Ohio inmate William Dwight Dotson appeals the district court's dismissal of his 42 U.S.C. § 1983 lawsuit brought against state prison officials. Dotson's suit challenges the retroactive application of Ohio parole eligibility regulations and claims that the officials' actions denied him due process and violated the Ex Post Facto Clause. The district court dismissed Dotson's *in forma pauperis* suit, pursuant to 28 U.S.C. § 1915(e), on the grounds that Dotson failed to state a claim upon which relief could be granted and/or that his suit lacked an arguable basis in law or fact.

On appeal, Dotson claims that the district court erred in holding that a challenge to the retroactive application of parole eligibility guidelines is not cognizable under § 1983 because a judgment on the merits would affect the validity of his conviction or sentence. We find that Dotson's suit is cognizable under § 1983, and therefore we reverse the district court's judgment and remand for further proceedings.

I.

Dotson brought this § 1983 action against Reginald A. Wilkinson, Director of the Ohio Department of Rehabilitation and Correction, John Kinkela, Chief of the Ohio Adult Parole Authority, and Margarette T. Ghee, Ohio Parole Board Chairperson. Dotson's *pro se* complaint alleged violations of Fourteenth Amendment due process, U.S.

Const. amend. XIV, § 1, and the Ex Post Facto Clause, U.S. Const. art. I, § 10, cl. 1. Dotson proceeded *in forma pauperis* in the district court, pursuant to 28 U.S.C. § 1915.

In July 1981, Dotson was sentenced by an Ohio court to life imprisonment upon conviction for aggravated murder. Dotson alleges that at the time of his conviction, Ohio Rev. Code § 2967.13(B) stated that inmates serving life sentences were eligible for parole after serving 15 years. If not released at the first parole hearing, the Parole Board was required by Ohio regulations to provide the prisoner another hearing within five years. Pursuant to the statute and regulations, Dotson became eligible for parole and received his first parole hearing in 1995, after serving 15 years. He was denied parole at that time, and the board deferred his second hearing for 10 years due to the seriousness of his offense, with a halfway review to be held in five years.

In 1998, three years after Dotson's first parole hearing, Ohio implemented new parole guidelines. The new guidelines determine an inmate's parole eligibility by factoring in the seriousness of the crime of conviction with the inmate's propensity for future criminal behavior and risk to society. Moreover, under the new guidelines, if a prisoner is not released upon his first parole hearing, a second parole hearing can be delayed up to 10 years, with no halfway review required.

Consistent with the earlier regulations, the Parole Board provided Dotson a halfway review on March 10, 2000. The Parole Board determined that the new guidelines applied retroactively and mandated that Dotson would have to serve 390 months (32.5 years) prior to gaining parole eligibility. Dotson's next hearing is scheduled for 2005, at which point he will still be over seven years short of parole eligibility.

Based on the Parole Board's application of the new regulations to his sentence, Dotson filed the present suit.

The district court dismissed Dotson's § 1983 claim *sua sponte*, without prior notice to the defendants and prior to the service of process. The district court acted pursuant to 28 U.S.C. § 1915(e), which states:

> **(2)** Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court *shall* dismiss the case *at any time* if the court determines that--
>
> . . . .
>
> **(B)** the action or appeal--
>
> **(i)** is frivolous or malicious;
>
> **(ii)** fails to state a claim on which relief may be granted . . . .

28 U.S.C. 1915(e)(2)(B)(i)-(ii) (West Supp. 2001) (emphasis added). Screening of a prisoner's *in forma pauperis* complaint "must occur even before process is served or the individual has had an opportunity to amend the complaint. The moment the complaint is filed, it is subject to review under § 1915(e)(2)." *McGore v. Wrigglesworth*, 114 F.3d 601, 608-09 (6th Cir. 1997), *distinguished on other grounds by Benson v. O'Brian*, 179 F.3d 1014, 1016-17 (6th Cir. 1999). Upon screening Dotson's initial pleading, the district court held that a prisoner's complaint is not cognizable under § 1983 if a judgment on the merits would affect the validity of an inmate's conviction or sentence, unless the conviction or sentence has been previously set aside. Relying on unpublished Sixth Circuit authority, the district court reasoned that Dotson's challenge to his parole eligibility status amounted to a challenge to the Parole Board's decision

to deny or revoke parole and that it necessarily questioned the validity of his confinement. The district court also certified, under 28 U.S.C. § 1915(a)(3), that an appeal of the decision could not be taken in good faith.

After receiving Dotson's notice of appeal, the Ohio Attorney General's office sent a letter to the Sixth Circuit Clerk of Court stating that no defendant had been served and that it had received no request for representation. Therefore, the Attorney General did not file a brief.

II.

We review *de novo* the district court's judgment dismissing a suit for failure to state a claim pursuant to § 1915(e)(2). *Brown v. Bargery*, 207 F.3d 863, 867 (6th Cir. 2000); *McGore*, 114 F.3d at 604. We view all the facts alleged in the complaint, as well as any inferences reasonably drawn therefrom, in the light most favorable to the plaintiff. *Brown*, 207 F.3d at 867. Furthermore, we read *pro se* complaints liberally. *Thaddeus-X v. Blatter*, 175 F.3d 378, 384 n.2 (6th Cir. 1999) (*en banc*).

Dotson argues that he is not challenging the validity of his conviction or sentence. Instead, he contends, he is challenging the procedures used by the defendants to determine his parole eligibility. The only relief he is seeking is an injunction ordering a new parole eligibility hearing, which would not affect the duration of his sentence or validity of his conviction. He also argues that the cases relied on by the district court concern parole revocation and sentence calculation, not the "parole-release determinations procedures."

A review of Supreme Court authority demonstrates the merit of Dotson's argument. In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), a class of state prisoners brought suit under § 1983 seeking injunctive relief and challenging the revocation of good-conduct-time credits that would have shortened their sentences. *Id.* at 476. After comparing the *habeas* statutes, 28 U.S.C. §§ 2241 and 2254, with 42 U.S.C. § 1983, the Supreme Court held that "when a state prisoner is challenging the *very fact* or *duration* of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." *Id.* at 500 (emphasis added).

The Court revisited the "intersection" between the *habeas* statutes and § 1983 in *Heck v. Humphrey*, 512 U.S. 477, 481 (1994), and considered "whether money damages premised on an unlawful conviction could be pursued under § 1983." *Id.* at 480 n.2. While acknowledging that *Preiser* did not directly bar the suit, the Court held that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence" has been invalidated. *Id.* at 482, 486-87 (footnote omitted). Thus, when examining a prisoner's § 1983 suit, "the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Id.* at 487. Earlier in the *Heck* opinion, the Court had analogized the plaintiff's suit to the tort of malicious prosecution and held that in order to proceed with such a claim the "termination of the prior criminal proceeding" must first be proven. *Id.* at 484. Nevertheless, if the "plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal

judgment against the plaintiff, the action should be allowed to proceed." *Id.* at 487 (emphasis in original).

Finally, in *Edwards v. Balisok*, 520 U.S. 641 (1997), the Court considered "whether a claim for damages and declaratory relief brought by a state prisoner challenging the validity of the procedures used to deprive him of good-time credits is cognizable under § 1983." *Id.* at 643. The Court reversed the Ninth Circuit, which had held that Balisok's suit was cognizable under § 1983 because it was a challenge to the *procedures* by which the credits were denied. The Supreme Court noted "that the nature of the challenge to the procedures *could be* such as necessarily to imply the invalidity of the judgment." *Id.* at 645 (emphasis added). The Court "conclude[d], therefore, that [Balisok's] claim for declaratory relief and money damages, based on allegations of deceit and bias on the part of the decisionmaker that necessarily imply the invalidity of the punishment imposed, is not cognizable under § 1983." *Id.* at 648.

As the holdings of these three cases indicate, only prisoner challenges under § 1983 that "necessarily imply" the invalidity of the conviction or challenge the duration of the physical imprisonment are not cognizable. Six years after handing down *Preiser*, the Supreme Court heard a § 1983 challenge to discretionary parole procedures in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 4 (1979). The Court did not analyze whether the suit was more properly filed as a *habeas* petition, but, instead, examined Nebraska's method for determining a prisoner's parole eligibility for compliance with due process. In still another case, the Court concluded, in *dicta*, that *Heck* and *Edwards* stand only for the proposition that if a prisoner seeks relief for the use of "the wrong procedures, not for reaching the wrong result, and if that procedural defect did not necessarily imply the invalidity" of the conviction or

sentence, the suit is cognizable under § 1983. *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (internal quotation marks and citations omitted).

This circuit has not issued a published opinion considering whether a prisoner's § 1983 challenge to the procedures employed in *parole eligibility* determinations is non-cognizable. Nonetheless, a number of unpublished decisions in this circuit suggest that challenges to a prisoner's parole eligibility are not cognizable under § 1983. For example, in *Ward v. Engler*, Nos. 00-1867/1948, 2001 WL 278683 (6th Cir. March 13, 2001) (unpublished disposition), a panel of this court reviewed a suit alleging that the Michigan Parole Board improperly denied prisoners serving life sentences "consideration for parole." *Id.* at *1. The court held that "[d]espite plaintiff's protestations to the contrary, his allegations amount to a claim that the parole decision in his case was wrong rather than a claim that incorrect procedures were used." *Id.* In the case before us today, the district court cited *Chandler v. Michigan Parole Board*, No. 99-1119, 2000 WL 875771 (6th Cir. June 20, 2000) (unpublished disposition), for the proposition that challenges to the denial or revocation of parole necessarily affect the validity of the inmate's continued confinement and are not cognizable under § 1983. *Id.* at *1; *see Coleman v. Ohio Adult Parole Auth.*, No. 99-4516, 2000 WL 1871680, at *3 (6th Cir. Dec. 11, 2000) (unpublished disposition); *Phillips v. Coleman*, No. 98-4131, 1999 WL 776189, at *1-2 (6th Cir. Sept. 20, 1999) (unpublished disposition). While the district court's finding is an accurate restatement of the law of *Edwards* and *Heck*, ultimately it is inapposite to Dotson's suit because it fails to appreciate the nature of Dotson's challenge. Clearly, the decision to grant a prisoner parole affects the duration of that prisoner's sentence, and a challenge to the decision is not cognizable under § 1983. However, Dotson is not challenging the denial or revocation of parole. Instead, he

challenges whether the Parole Board properly revoked his *eligibility* for parole, and that determination will have no immediate effect on his sentence.

Other circuits that have examined the "intersection" of *habeas* and § 1983 have recognized this distinction. The District of Columbia Circuit held that a § 1983 prisoner suit for injunctive relief need not have been filed as a petition for a writ of *habeas corpus* when it only sought reinstatement of the prisoner's parole eligibility. *Anyanwutaku v. Moore*, 151 F.3d 1053, 1055 (D.C. Cir. 1998). The court concluded that because D.C. parole decisions are entirely discretionary, had the petitioner succeeded in his suit "he would have earned nothing more than a 'ticket to get in the door of the parole board.'" *Id.* at 1056. The court went on to note that "a majority of our sister circuits have held that challenges to state parole procedures whose success would not necessarily result in immediate or speedier release need not be brought in habeas corpus." *Id.* at 1055-56. In a suit concerning prisoners' reassignment from administrative segregation, the Fifth Circuit stated that "[i]f a favorable determination would not automatically entitle the prisoner to accelerated release, the proper vehicle is a § 1983 suit." *Carson v. Johnson*, 112 F.3d 818, 820-21 (5th Cir. 1997) (internal quotation marks, ellipsis, alterations, and citation omitted). Because the prisoner's suit "would merely enhance eligibility for accelerated release[, the] . . . suit is properly characterized as a § 1983 suit." *Id.* at 821 (internal quotation marks and citation omitted). Finally, the Ninth Circuit, in *Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997), held that prisoners' challenges to their sexual offender classification should proceed under § 1983 because the result rendered would determine their eligibility for parole and would not "necessarily shorten their prison sentences by a single day." *Id.* at 824; *see Moran v. Sondalle*, 218 F.3d 647 (7th Cir. 2000) (*per curiam*); *Metheny v. Hammonds*, 216 F.3d 1307 (11th Cir. 2000), *cert. denied*, 531 U.S. 1196 (2001).

We are persuaded that these courts have reached the correct result. Therefore, our unpublished decisions notwithstanding, we now join our sister circuits and hold that when a prisoner challenges his parole eligibility, and the challenge does not necessarily affect the duration of his confinement, the suit is cognizable under § 1983. Dotson's suit, "even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, [and so] the action should be allowed to proceed." *Heck*, 512 U.S. at 487. A suit seeking reinstatement of a prisoner's parole eligibility is not a "challenge to the fact or duration of his confinement." *Preiser*, 411 U.S. at 489.

Ohio has a completely discretionary parole system. Ohio Rev. Code § 2967.03; *State ex rel. Blake v. Shoemaker*, 446 N.E.2d 169, 170 (Ohio 1983) (*per curiam*). Merely granting Dotson parole eligibility does not affect the duration or validity of his sentence. As the D.C. Circuit phrased it, Dotson's requested relief would only get him "in the door." Admittedly, whether Dotson is eligible for parole has, what could be termed, a "qualitative effect" on his sentence--a sentence served with parole eligibility is more desirable than one without. Nevertheless, as early as *Preiser* the Supreme Court held that the determination of whether a suit is cognizable under § 1983, or more properly heard pursuant to the *habeas* statutes, turns on whether the "prisoner is challenging the very fact or duration of his physical imprisonment." 411 U.S. at 500. The duration of Dotson's imprisonment will not necessarily be affected if he gains parole eligibility.

III.

The district court erred in holding that Dotson's challenge to his parole eligibility was not cognizable under § 1983. Therefore, we **REVERSE** the district court's judgment and **REMAND** for further proceedings.

CONCURRENCE

R. GUY COLE, JR., Circuit Judge, concurring. Only one legal question is at issue here: whether, as set forth in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the writ of habeas corpus provides the exclusive remedy for petitioner's challenge to the scheduling of his parole hearing. I conclude that the writ of habeas corpus does not provide the exclusive remedy for petitioner's challenge and, for that reason, he may bring a § 1983 action.

The writ of habeas corpus provides the exclusive remedy for challenges that necessarily imply the invalidity of the fact or duration of a prisoner's confinement. *See Edwards v. Balisok*, 520 U.S. 641, 646, 648 (1997); *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994); *Anyanwutaku v. Moore*, 151 F.3d 1053, 1055-56 (D.C. Cir. 1998); *Neal v. Shimoda*, 131 F.3d 818, 824 (9th Cir. 1997). Here, petitioner appeals only the scheduling of his release hearing. Neither outcome of that decision -- rescheduling the hearing or not rescheduling the hearing -- necessarily implies the invalidity of petitioner's continued confinement. Thus, because petitioner does not challenge a release decision, the writ of habeas corpus is not petitioner's exclusive remedy and he may challenge it through a § 1983 action. For this reason, I concur in reversing the district court's dismissal.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

WILLIAM DWIGHT DOTSON	)CASE NO. 3:00 CV 7303
	)
Plaintiff,	) JUDGE DAVID A.
	) KATZ
	)
v.	) OPINION AND ORDER
	)
REGINALD WILKINSON, et al.,)	
	)
Defendants.	)

On May 12, 2000, plaintiff *pro se* William Dwight Dotson filed the above-captioned action under 42 U.S.C. § 1983 against Department of Rehabilitation and Correction Director Reginald Wilkinson, Ohio Adult Parole Authority ("OAPA") Chief John Kinkela, and Ohio Parole Board Chairperson Margarette T. Ghee. Plaintiff asserts that Ohio's new parole guidelines were applied retroactively to his case to determine his eligibility for parole in violation of the Due Process Clause and Ex Post Facto Clause of the United States Constitution.

In the complaint, plaintiff alleges he was sentenced on July 22, 1981 to life imprisonment for aggravated murder. He further alleges that at the time of his conviction, prisoners who received a life sentence were eligible for parole after serving fifteen years of incarceration. He contends that if the prisoner was not released at the first parole eligibility hearing, the parole board was required to held a second hearing no later than five years after the minimum eligibility

date for release. On March 1, 1998, the Ohio Parole Board adopted new guidelines to assist the board in determining whether to grant or deny parole. The new guidelines weigh both the seriousness of the offense committed, and the inmate's criminal history or risk to society to provide a range of months that must served before the inmate becomes eligible for parole release. In addition, the new guidelines permit a continuance of the hearing for up to ten years.

Plaintiff claims he became eligible for parole in April, 1995 after serving fifteen years in prison. Due to the seriousness of his offense, plaintiff's parole was allegedly deferred for an additional ten years, making him eligible for parole again in June, 2005. Pursuant to Administrative Rule 5120-1-1-10(C), plaintiff was given a half time review hearing on March 10, 2000. At this hearing, the review panel allegedly applied the new parole guidelines to plaintiff's case, resulting in the determination that plaintiff must serve a mandatory minimum of 390 months (32 years) before he could be considered for release. Plaintiff's next hearing is still scheduled for June, 2005; however, the panel noted on his record that he would still be seven years short of the minimum time he was required to serve under the guidelines. Plaintiff asserts that the application of the guidelines to his case denied him due process and violated the Ex Post Facto Clause. He asks this court to grant him declaratory and injunctive relief.

Although *pro se* pleadings are liberally construed, *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520 (1972), the district court is required to dismiss an *in forma pauperis* action under 28 U.S.C. §1915(e) if it fails to state a claim upon which relief

can be granted, or if it lacks an arguable basis in law or fact.[1] *Neitzke v. Williams*, 490 U.S. 319 (1989); *Lawler v. Marshall*, 898 F.2d 1196 (6th Cir. 1990); *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996). For the reasons stated below, this action is dismissed pursuant to section 1915(e).

A prisoner may not raise claims under 42 U.S.C. § 1983 if a judgment on the merits of those claims would affect the validity of his conviction or sentence, unless the conviction or sentence has been set aside. *See Edwards v. Balisok*, 520 U.S. 641, 646 (1997); *Heck v. Humphrey*, 512 U.S. 477, 486 (1994). This principle has been applied to § 1983 claims which challenge the denial ore revocation of parole, since a favorable judgment on those issues would necessarily affect the validity of the inmate's continued confinement. *See Chandler v. Michigan Parole Board*, No. 99-1119, 2000 WL 875711 (6th Cir. June 20, 2000)(finding that a challenge to the procedures used to grant or deny

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[1] An *in forma pauperis* claim may be dismissed *sua sponte*, without prior notice to the plaintiff and without service of process on the defendant, if the court explicitly states that it is invoking section 1915(e) [formerly 28 U.S.C. § 1915(d)] and is dismissing the claim for one of the reasons set forth in the statute. *McGore v. Wrigglesworth*, 114 F.3d 601, 608-09 (6th Cir. 1997); *Spruytte v. Walters*, 753 F.2d 498, 500 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986); *Harris v. Johnson*, 784 F.2d 222, 224 (6th Cir. 1986); *Brooks v. Seiter*, 779 F.2d 1177, 1179 (6th Cir. 1985).

parole is not cognizable under § 1983).[2] The holding in *Heck* applies whether plaintiff seeks injunctive, declaratory or monetary relief. *Wilson v. Kinkela*, No. 97-5035, 1998 WL 246401 at *1 (6th Cir. May 5, 1998). Plaintiff does not allege his continued confinement has been declared invalid by either an Ohio state court or a federal habeas corpus decision. His claims must therefore be dismissed.

Accordingly, this action is dismissed pursuant to 28 U.S.C. § 1915(e). Further, the court certifies pursuant to 28 U.S.C. § 1915(a)(3) that an appeal from this decision could not be taken in good faith.[3]

IT IS SO ORDERED.

DAVID A. KATZ
UNITED STATES DISTRICT JUDGE

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[2] *See also Douglas v. Ohio Adult Parole Authority*, No. 99-3656, 2000 WL 658542 (6th Cir. May 10, 2000); *Johnson v. Wilkinson*, No. 99-3475, 2000 WL 553929 at *2 (6th Cir. April 28, 2000); *Rienholz v. Campbell*, No. 98-6290, 1999 WL 1045243 (6th Cir. Nov. 8, 1999); *Wilson v. Kinkela*, No. 97-4035, 1998 WL 246401 (6th Cir. May 5, 1998).

[3] 28 U.S.C. § 1915(a) provides, in pertinent part:

An appeal may not be taken *in forma pauperis* if the trial court certifies that it is not taken in good faith.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

WILLIAM DWIGHT DOTSON	CASE NO. 3:00 CV 7303
Plaintiff,	JUDGE DAVID A. KATZ
v.	JUDGMENT ENTRY
REGINALD WILKINSON, et al.,	
Defendants.	

This court having contemporaneously filed its Opinion and Order in this case, it is therefore ORDERED that this action is dismissed pursuant to 28 U.S.C. § 1915(e). Further, the court CERTIFIES pursuant to 28 U.S.C. §1915(a)(3) that an appeal from this decision could not be taken in good faith.

DAVID A. KATZ
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ROGERICO J. JOHNSON	)	CASE NO. 4:00 CV 1075
	)	
Plaintiff,	)	JUDGE
	)	PETER C. ECONOMUS
vi.	)	
	)	MEMORANDUM OF
MARGARET T. GHEE,	)	OPINION AND ORDER
	)	
Defendant.	)	

On April 26, 2000, plaintiff Rogerico J. Johnson filed this action under 42 U.S.C. § 1983 against Ohio Adult Parole Authority Chairperson Margate T. Ghee.[4] Plaintiff is currently incarcerated in the Ohio State Penitentiary having been denied parole.

In the complaint, plaintiff states he was given a parole review hearing on April 9, 1999. At this hearing, plaintiff allegedly met with only one parole board representative. He claims this practice violates "DAR 5120:1-1-11(C)" which requires at least one parole board member and one hearing

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[4] Although inmate Derrick Matthews appears to have signed the complaint as a plaintiff, his name has been crossed out in the case caption. He has not signed the Motion to Proceed *In forma Pauperis* and is not listed as a plaintiff on any other forms submitted with this case. The court will therefore assume he does not wish to proceed as a plaintiff in this case.

officer to be present at all parole hearings. He alleges that after meeting with this parole representative, he was given a ten year continuance which is the maximum amount of time that can be assessed at one hearing. He claims that other prisoners who were seen by only one parole board representative also received the maximum amount of time for a continuance. He states that "if each prisoner's record is thoroughly investigated and the parole guidelines are applied appropriately, Ohio Parole Authorities can't justify giving [us] . . . ten years." (Compl. at 3.) He concludes therefore that "our parole papers have been fraudulently doctored by the one parole board representative we each saw." (Compl. at 3.)

Furthermore, plaintiff claims he was not allowed to participate, interact, or give an opinion at his parole review hearing. He contends the parole board representative reviewed his files at a distance without asking any questions of him. He allegedly received his notice of continuance in the mail and immediately noticed several errors. Among these errors were the inclusion of offenses for which plaintiff had never been convicted, the inclusion of prison conduct reports which did not even exist," and errors in the calculation of time for each offense or behavior under the parole guidelines. (Compl. at 4.) Plaintiff states that these mistakes could be eliminated if prisoner were informed of the basis for denying their release on parole. He contends he has a constitutionally based liberty interest in a proper parole review hearing and that the parole board's failure to follow its procedures violated his right to due process.

Finally, plaintiff asserts the new parole guidelines enacted as part of Ohio Senate Bill 2 are being applied retroactively to offenses committed prior to the effective date of the Act. Plaintiff states he was convicted of aggravated robbery prior to the enactment of Ohio Senate Bill 2. He

claims that at the time he committed his crime, prisoners convicted of this offense were potentially subject to no greater than a five year continuance between hearings. He contends he was given a longer continuance under the new parole guidelines in violation of the Ex Post Facto Clause.

Although pros se pleadings are liberally construed, *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520 (1972), the district court is required to dismiss an *in forma pauperis* action under 28 U.S. C. §1915(e) if it fails to state a claim upon which relief can be granted, or if it lacks an arguable basis in law or fact.[5] *Neitzke v. Williams*, 490 U.S. 319 (1989); *Lawler v. Marshall*, 898 F.2d 1196 (6th Cir. 1990); *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996). For the reasons stated below, this action is dismissed pursuant to section 1915(e).

A prisoner may not raise claims under 42 U.S.C. § 1983 if a judgment on the merits of those claims would affect the validity of his conviction or sentence, unless the conviction or sentence has been set aside. *See Edwards v. Balisok*, 520 U.S. 641, 646 (1997); *Heck v. Humphrey*, 512 U.S. 477, 486 (1994). This principle has been applied to § 1983 claims which challenge the denial or revocation of

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5 An *in forma pauperis* claim may be dismissed *sua sponte*, without prior notice to the plaintiff and without service of process on the defendant, if the court explicitly states that it is invoking section 1915(e) [formerly 28 U.S. C. § 1915(d)] and is dismissing the claim for one of the reasons set forth in the statute. *McGore v. Wrigglesworth*, 114 F.3d 601.608-09 (6th Cir. 1997); *Spruytte v. Walters*, 753 F.2d 498, 500 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986); *Harris v. Johnson*, 784 F.2d 222, 224 (6th Cir. 1986); *Brooks v. Seiter*, 779 F.2d 1177, 1179 (6th Cir. 1985).

parole, since a favorable judgment on those issues would necessarily affect the validity of the inmate's continued confinement. *See Chandler v. Michigan Parole Board*, No. 99-1119, 2000 WL 875711 (6th Cir. June 20, 2000) (finding that a challenge to the procedures used to grant or deny parole is not cognizable under § 1983).[6] The holding in *Heck* applies whether plaintiff seeks injunctive, declaratory or monetary relief. *Wilson v. Kinkela*, No. 97-4035, 1998 WL 246401 at *1 (6th Cir. May 5, 1998). Plaintiff does not allege his continued confinement has been declared invalid by either an Ohio state court or a federal habeas corpus decision. His claims must therefore be dismissed.

Accordingly, this action is dismissed under 28 U.S.C. § 1915(e). The court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith.[7]

IT IS SO ORDERED.

PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

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6 *See also Douglas v. Ohio Adult Parole Authority*, No. 99-3656, 2000 WL 658542 (6th Cir. May 10, 2000); *Johnson v. Wilkinson*, No. 99-3475, 2000 WL 553929 at *2 (6th Cir. April 28, 2000); *Rienholz v. Campbell*, No. 98-6290, 1999 WL 1045243 (6th Cir. Nov. 8, 1999); *Wilson v. Kinkela*, No. 97-4035, 1998 WL 246401 (6th Cir. May 5, 1998).

7 28 U.S.C. § 1915(a)(3) provides:

An appeal may not be taken *in forma pauperis* if the trial court certifies that it is not taken in good faith.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ROGERICO J. JOHNSON	)	CASE NO. 4:00 CV 1075
	)	
Plaintiff,	)	JUDGE
	)	PETER C. ECONOMUS
vii.	)	
	)	JUDGMENT ENTRY
MARGARET T. GHEE,	)	
	)	
Defendant.	)	

This court having contemporaneously filed its Memorandum of Opinion in this case, it is therefore ORDERED that this action is dismissed pursuant to 28 U.S.C. § 1915(e). Further, the court CERTIFIES pursuant to 28 U.S.C. §1915(a)(3) that an appeal from this decision could not be taken in good faith.

PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

APPENDIX E

28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction

of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. § 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making

application to the district court of the district in which the applicant is held.

28 U.S.C. § 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable;
or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground

for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be

counted toward any period of limitation under this subsection.

28 U.S.C. § 2245. Certificate of trial judge admissible in evidence

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

28 U.S.C. § 2246. Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

28 U.S.C. § 2247. Documentary evidence

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

28 U.S.C. § 2248. Return or answer; conclusiveness

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except

to the extent that the judge finds from the evidence that they are not true.

28 U.S.C. § 2249. Certified copies of indictment, plea and judgment; duty of respondent

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

28 U.S.C. § 2250. Indigent petitioner entitled to documents without cost

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

28 U.S.C. § 2251. Stay of State court proceedings

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

28 U.S.C. § 2252. Notice

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.

28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The

applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts, [21 USCS § 848] in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

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(3)

No.03-287

IN THE

Supreme Court of the United States

REGINALD WILKINSON, DIRECTOR, et al.,

Petitioner,

v.

WILLIAM DWIGHT DOTSON et al.,

Respondent.

On Petition For a Writ Of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a prisoner assert a § 1983 claim challenging procedures used in connection with parole proceedings where such a challenge, if successful, would neither invalidate a parole decision nor affect the duration of the prisoner's sentence or confinement?

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INTRODUCTION

For over 30 years, this Court has consistently acknowledged that challenges to certain aspects of parole are actionable under § 1983. Although the Court has recognized some limits on these actions, it has emphasized that these limits are not applicable to every parole challenge. If a prisoner seeks to undermine the length of his sentence or the result of a parole hearing, the action is barred unless the prisoner first has his sentence or parole decision overturned. But if a prisoner brings a § 1983 suit "for using the wrong [parole] procedures, not for reaching the wrong result, and if that procedural defect did not necessarily imply the invalidity of the [parole decision]," then the lawsuit is not barred. *E.g.*, *Spencer v. Kemna*, 523 U.S. 1, 17 (1998). There is no shortage of Supreme Court jurisprudence to illustrate this principle.

Because application of this rule requires a careful analysis of the type of challenge at issue, it is necessarily fact specific. The outcome of any case depends solely on the exact nature of the prisoner's claim. The circuit courts have been faithful to the Court's fact-bound distinctions and consistent in applying this well-established rule. To be sure, the lower courts have reached different results in different cases, but these differences lie entirely in variations among the prisoners' underlying claims, not the application of the rule of law.

Like all other circuits, the Sixth Circuit's decision below correctly applied Supreme Court precedent. The court held, unanimously, that Respondent Dotson's claim was not barred because his challenge was entirely unrelated to any particular parole decision. Thus, a win for Dotson neither necessarily implies the invalidity of his sentence or conviction, nor results in his earlier release. In Respondent Johnson's case, a majority of the Sixth Circuit properly held that, because Johnson challenged only parole procedures, and not the decision denying his parole, his claim was not barred, either.

Importantly, even dissenting judges in Johnson's case did not proffer a different rule of law, but rather interpreted the factual allegations of Johnson's claim differently than the majority.

There is, thus, no need for further guidance from this Court on the rule of law to be applied to § 1983 challenges involving parole processes. The recent decisions of the Court commenting on the issue, *Edwards v. Balisok*, 520 U.S. 641 (1997), and *Spencer v. Kemna*, 523 U.S. 1 (1998), and other Supreme Court decisions, collectively set forth a uniform rule that has only begun to be applied by the circuits. Circuit courts have, in this short time, developed a consistent, yet fact-based, approach to ruling on these § 1983 claims. Accordingly, the petition should be denied.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CIRCUIT SPLIT ON THE FACT-BOUND ISSUES PRESENTED IN THE PETITION.

Petitioners argue that this Court should grant review to resolve a circuit conflict over whether *Heck* applies "to claims whose success would result in a new parole hearing . . . but not necessarily alter the parole decision or shorten the duration of confinement." (Pet. 10.) There is, however, no split of authority on this issue. While lower courts have reached different outcomes in cases involving § 1983 challenges relating to parole, these differences are fully explained by factual differences among the cases; the lower courts' rules of decision are completely consistent, and the lower courts faithfully adhere to this Court's jurisprudence.

A. Supreme Court precedent

This Court has consistently distinguished between § 1983 challenges to parole hearing procedures and challenges to the merits of a parole decision. In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the Court first addressed the issue. There, the Court held that state prisoners could not bring § 1983 claims

seeking restoration of prison good time credits, because had the prisoners been successful, they would have been released from prison sooner. As a result, their claims impermissibly overlapped with a federal habeas remedy. *Id.* at 500 ("when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release . . . his sole federal remedy is a writ of habeas corpus").

Applying the same reasoning, in *Heck v. Humphrey*, 512 U.S. 477 (1994), this Court rejected a prisoner's § 1983 suit, in which the prisoner claimed that state officials had engaged in an unlawful investigation that led to his arrest and conviction. The Court reasoned that the § 1983 claim could not be maintained absent a successful challenge to the plaintiff prisoner's conviction, because a ruling in his favor would "necessarily demonstrate the invalidity of his conviction." *Heck*, 512 U.S. at 481. That is, the Court concluded that the prisoner could not recover damages for an unconstitutional conviction until he first prevailed in challenging the merits of that conviction. Because a state court appeal of the prisoner's conviction was then-pending and had not been terminated in his favor, his claim was barred. Importantly, however, the Court recognized that a § 1983 cause of action could be a proper vehicle for some challenges to procedures used in, but not decisions of, a criminal hearing:

> . . . if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed.

Id. at 487.

Edwards v. Balisok, 520 U.S. 641 (1997), further defined permissible § 1983 challenges, this time in the context of parole hearings. There, prisoner Balisok filed a § 1983 claim for an alleged unconstitutional deprivation of his good time

credits. *Id.* at 643. Balisok's claim asserted deceit and bias on the part of the decision-maker who stripped him of his credits. Because those allegations necessarily implied the invalidity of that decision, *i.e.*, bias and deceit led to the wrong decision, the claim was not cognizable under § 1983. *Id.* at 648.

As in *Heck*, the Court in *Balisok* did not bar all § 1983 challenges to parole procedures. Rather, the Court acknowledged that a plaintiff may be entitled to nominal damages in a § 1983 challenge alleging loss of credits without due process (*id.* at 645), and emphasized that a claim for prospective injunctive relief would likely not "necessarily imply" the validity of a sentence or conviction. *Id.* at 648.

In contrast to *Heck* and *Balisok*, in *Wolff v. McDonnell*, 418 U.S. 539 (1974), a case petitioners conveniently ignore, the Court permitted a § 1983 action challenging Nebraska's *process* for revoking good-time credits. The key difference between *Wolff* and the Court's decisions barring certain § 1983 actions is that, in *Wolff*, the plaintiffs did not seek actual restoration of their credits, but instead challenged state-created parole procedures. *Wolff* 's facts, thus, did not implicate the rule that barred the prisoner § 1983 actions challenging confinement and parole decisions in *Heck* and *Balisok*. Instead, the Court in *Wolff* held that Nebraska's parole procedures embodied a protected liberty interest and, thus, permitted the prisoners to pursue their § 1983 claim. *Id.* at 556. *See also Greenholz v. Nebraska Penal Inmates*, 442 U.S. 1, 12 (1979) (holding § 1983 cognizable because "the expectancy of release provided in [a parole] statute is entitled to some measure of constitutional protection").

Reaffirming this distinction between challenges to outcome and procedure, the Court in *Spencer v. Kemna*, 523 U.S. 1 (1998), recently confirmed that § 1983 is an appropriate vehicle to challenge parole procedures. The question in that case was whether a former prisoner could continue to pursue his habeas petition challenging parole revocation, even though

the petition was seemingly moot because he had been released. *Id.* at 3-5. The petitioner argued, in part, that his habeas action was not moot because, under *Heck*, he needed to invalidate the decision before pursuing a § 1983 action challenging the parole decision. The Court rejected the argument, affirmed dismissal on mootness grounds, and re-articulated the rule that has emerged from Supreme Court precedent:

> "[i]f [a] petitioner were to seek damages for using the wrong [parole] procedures, not for reaching the wrong result, and if that procedural defect did not necessarily imply the invalidity of the revocation, then *Heck* would have no application at all"

Id. at 17 (internal citations omitted).

B. There Is No Circuit Split.

Petitioners' "conflicting" decisions, when viewed in light of their underlying facts, are consistent with Supreme Court precedent and uniform with one another. All apply the critical distinction between outcome and procedure developed in the Court's § 1983 jurisprudence. Any analytical variations are explained by the factual differences in each case, specifically differences between the kinds of challenges at issue, not by any conflicting interpretation or application of the law. And, in any event, these factual differences and results do not implicate the facts of Respondents' claims, making the cases at issue here particularly inappropriate vehicles to address any perceived conflict among these decisions.

1. The Sixth, Seventh and D.C. Circuits have uniformly concluded that a prisoner can challenge parole procedures through § 1983.

Petitioners correctly acknowledge that reported decisions from the Sixth, Seventh and D.C. Circuits are uniform in their treatment of § 1983 challenges to parole procedures. (Pet. 10-11.) These circuits have, consistent with Supreme Court

precedent, looked to the nature of the challenge to determine whether a § 1983 action involving parole procedures is barred.

The D.C. Circuit, for example, has addressed both permissible and impermissible § 1983 challenges involving parole. In *Anyanwutaku v. Moore*, 151 F.3d 1053 (D.C. Cir. 1998), the court allowed a prisoner's § 1983 claim to proceed, where in *Best v. Kelly*, 39 F.3d 328 (D.C. Cir. 1994), the same court affirmed the district court's dismissal of a prisoner's § 1983 claim. Despite differing results, the panels in each of those cases adhered to a uniform rule of law.

In *Anyanwutaku*, the court refused to bar a § 1983 claim where the plaintiff alleged that the defendants violated his due process and equal protection rights by miscalculating his parole eligibility date and mis-classifying him as a felon. 151 F.3d at 1054. Reviewing Supreme Court precedent, the court concluded that a state prisoner may bring a § 1983 claim when, "if successful, it would not 'necessarily imply' or automatically result in, a speedier release from prison." *Id.* at 1056. Because parole in that jurisdiction was discretionary, a successful challenge to a prisoner's parole eligibility date was "no guarantee that he would have been released any earlier." *Id.* at 1055. Section 1983 was, thus, an appropriate vehicle because, if successful, "he would have earned nothing more than a 'ticket to get in the door of the parole board.'" *Id.* at 1056.

On the other hand, in *Best*, the D.C. Circuit affirmed the lower court's dismissal of prisoners' § 1983 claims relating to the loss of their good time credits. 39 F.3d at 330. There, the prisoners' challenge would have directly affected the duration of their confinement. *Id.* Following this Court's *Preiser* decision, the D.C. Circuit held that such a challenge to the length of the prisoners' sentences was barred. *Id.* Unlike the challenges at issue in *Anyanwutaku*, the prisoners' claims in *Best*, if successful, would have resulted in their earlier release.

The D.C. Circuit's analysis in those decisions was followed by the Sixth Circuit in the court below (*Dotson*, 329 F.3d at 472):

> where a prisoner does not claim immediate entitlement to parole or seek a shorter sentence but instead lodges a challenge to the procedures used during the parole process as generally improper or improper as applied to his case, and that challenge will at best result in a new discretionary hearing the outcome of which cannot be predicted, we hold such a challenge cognizable under § 1983.

And the D.C. and Sixth Circuit holdings are consistent with Seventh Circuit precedent. *Johnson v. Litscher*, 260 F.3d 826, 830-31 (7th Cir. 2001) (permitting § 1983 challenge to parole processes that did not seek to shorten sentence or confinement); *Ferguson v. Nagel*, 34 Fed. Appx. 499 (7th Cir. 2001) (same). (Pet. 10.)

2. The decisions of the First, Eighth and Tenth Circuits are not inconsistent with the decisions of the Sixth, Seventh and D.C. Circuits.

Citing decisions by the First, Eighth and Tenth Circuits, petitioners attempt to manufacture a circuit split by ignoring the facts of these decisions and focusing on their results. When understood in their factual context, it is clear that these circuits applied Supreme Court precedent in precisely the same manner as the Sixth, Seventh and D.C. Circuits.

The petitioners first assert that the Tenth Circuit's decision in *Vann v. Oklahoma State Bureau of Investigation*, 28 Fed. Appx. 861, 862 (10th Cir. 2001), is inconsistent with other circuits, but this is wrong. In that case, a prisoner brought a § 1983 action alleging that the defendants maintained false or incorrect information in his criminal history file. Importantly, the prisoner alleged that this incorrect information was used to deny him parole—thereby rendering his challenge one

directed to the merits of the parole decision. *Id.* The Tenth Circuit affirmed dismissal because, if the prisoner's claim was successful, it would necessarily cast doubt on the substance of the parole board's decision, *i.e.*, that he was wrongly denied parole because of the incorrect information in his file. *Id.* at 864. Thus, unlike the decisions of the other circuits, *Vann* unquestionably involved a challenge to the merits of, not the procedures used during, a parole proceeding.

For the same reason, petitioners are wrong to cite the Tenth Circuit's decision in *Waeckerle v. Oklahoma*, 37 Fed. Appx. 395, 395 (10th Cir. 2002), as evidence of a split in authority. The prisoner there brought a § 1983 claim challenging a parole decision because, according to the plaintiff, the parole investigator unconstitutionally relied on errors contained within the prisoner's pre-sentence report. *Id.* The panel affirmed dismissal because the prisoner's claim challenged the calculus of the parole decision, *i.e.*, its outcome. Accordingly, no decisions from the Tenth Circuit appear to be in conflict with other circuit precedent.

Like the decisions of the Tenth Circuit, the cited decisions of the First and Eighth Circuits are unpersuasive evidence of a circuit conflict. The supposed authoritative decisions of those courts were not published and were far too conclusory to demonstrate the circuits' rules of decision. *See McClain v. Fuseymore*, No. 97-2095, 1998 U.S. App. LEXIS 8332 (1st Cir. Apr. 25, 1998); *Bass v. Mitchell*, No. 93-1414, 1995 U.S. App. LEXIS 9663 (8th Cir. Apr. 28, 1995).[1] The Eighth Circuit merely reasoned that, if the prisoner were successful, it would "necessarily imply the invalidity of [the prisoner's] confinement." *Bass*, 1995 U.S. App. LEXIS, at *2. But the

[1] The First and Eighth Circuits have similar local rules reflecting that unpublished opinions generally lack precedential value. 8th Cir. R. 28A(i) (stating unpublished opinions have no precedential value); 1st Cir. R. 36(b)(2)(F) (stating that, unless unpublished decision relates to the case, "only published opinions may be cited" to the court).

court failed to analyze how or why this would occur. And the First Circuit, providing even less analysis, held that the prisoner's claims were barred because challenges to the denial of parole are not cognizable without first exhausting state remedies. *McClain,* 1998 U.S. App. LEXIS, at *2.

Even assuming these cases have sufficient precedential value to be considered in an analysis of the supposed circuit conflict, neither holding is completely inconsistent with holdings of other circuits. Rather, the rule set forth in each of these supposed "conflicting" decisions is in line with others—including circuits not mentioned by petitioners—holding that a prisoner's § 1983 claim is not barred by *Heck* or *Balisok* when it merely challenges the procedures a state employs in considering applications for parole, as opposed to the merits or outcome of the parole board's decision. *Anyanwutaku,* 151 F.3d at 1053; *Dotson v. Wilkinson*, 329 F.3d 463, 472 (6th Cir. 2003); *Johnson*, 260 F.3d at 830-31. *See also Leamer v. Fauver*, 288 F.3d 532, 543 (3d Cir. 2002) (reversing dismissal of § 1983 claim challenging denial of eligibility for parole because "[w]hatever the decision on the § 1983 claim, Learner's release date will not change"); *Thomas v. Georgia State Bd. of Pardon & Paroles,* 881 F.2d 1032, 1033 (11th Cir. 1989) (reversing dismissal of inmate's § 1983 claim because "[a prisoner's] challenge to the procedure by which parole decisions are made, as opposed to the denial of his parole, can properly proceed under section 1983"); *Miller v. Jackson,* No. 94-6395, 1994 U.S. App. LEXIS 26817, at * 1 (4th Cir. Sept. 23, 1994) (holding that prisoner properly brought his claims under § 1983 because he "challenged not the right to parole, but the right to procedural due process in the consideration of parole").

C. No circuits are internally inconsistent.

Petitioners assert that the Ninth and Fourth Circuits "have issued opinions going in both directions." (Pet. 12.) Here, too, while courts in these circuits may have reached different results, the legal principles as applied are uniform.

The Ninth Circuit's decisions in *Butterfield v. Bail,* 120 F.3d 1023 (9th Cir. 1997), and *Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997), are not contradictory. The failed § 1983 claim at issue in *Butterfield* challenged the outcome reached by the parole board. Specifically, the prisoner asserted that incorrect information in his prisoner file was used to deny him parole. *Id.* at 1024. His challenge, if successful, would have invalidated the parole decision and therefore was barred.[2]

In contrast, *Neal* (similar to Dotson's case here) involved a prisoner's claim that an *ex post facto* law unlawfully modified his parole eligibility date. No parole decision was at issue there. In fact, the *Neal* panel specifically recognized that *Butterfield* was the prevailing circuit precedent but was distinguishable on its facts. *Neal*, 131 F.3d at 824 ("[w]e have little difficulty distinguishing this case from our recent decision in *Butterfield*."). These two Ninth Circuit cases, thus, reflect different fact patterns, not different rules of law.

The Fourth Circuit has no inconsistent decisions, either. The two cases cited by Petitioners, *Husketh v. Sills*, 34 Fed. Appx. 104 (4th Cir. 2002), and *Miller v. Jackson*, No. 94-6395, 1994 U.S. App. LEXIS 26817 (4th Cir. Sept. 23, 1994), are both one-page per curium decisions, with little factual background from which a rule could emerge.[3] Nonetheless, in *Husketh*, the court affirmed dismissal of the *pro se* prisoner's

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[2] This decision, too, is consistent with the Tenth Circuit's treatment of similar factual scenarios in *Vann* and *Waekerele*.

[3] Similar to the First and Eight Circuit local rules, Fourth Circuit unpublished decisions have no precedential value. 4th Cir. R. 36(c).

§ 1983 action because his unspecified "challenge of his parole eligibility implies the invalidity of his continued confinement." 34 Fed. Appx. at 104 n.2. On the other hand, the court in *Miller* permitted a § 1983 prisoner's due process challenge to proceed because he "challenged not the right to parole, but the right to procedural due process in the consideration of parole," a far different claim than that made in *Husketh*. These decisions, as well, reflect differences in results based on factual allegations, not differences in how the law was applied.

II. THE SIXTH CIRCUIT'S DECISION WAS CORRECT.

Contrary to Petitioners' claim, the Sixth Circuit's *Dotson* decision is consistent with this Court's holdings. Like this Court, the Sixth Circuit recognized that procedural challenges to parole hearings are permitted under § 1983 so long as those challenges do not necessarily invalidate the parole decision.

A. Johnson permissibly challenged parole procedures, not the parole decision.

The court below correctly held that Johnson's § 1983 claim is not barred because he challenged only procedural defects during his parole hearing. *Dotson*, 329 F.3d at 471. For instance, Johnson asserted that Ohio's parole procedures require at least two hearing officers to conduct the parole hearing, but that only one showed up for his parole hearing. Johnson also alleged that a parole applicant must be given the opportunity to be heard, but at his parole hearing, Johnson was not permitted to speak. *Id.* It is clear that these allegations are entirely procedure-based.[4] Indeed, the parole board can reach

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[4] One potential procedural defect in the petition is that it may be moot. Johnson received part of his requested relief, a new parole hearing, after filing his lawsuit. The record does not reflect whether that hearing comported with Due Process or otherwise remedied the alleged violation of his constitutional rights. Even if it had, Johnson would still be permitted

exactly the same result if Johnson is provided a new hearing. *Id.* ("[t]he remedying of many procedural defects will not cause any different outcome at all, much less 'necessarily imply' that the prisoner should be released immediately or sooner than he would have been released absent the challenge").

In addition, while Johnson has claimed that the hearing officer used incorrect information in considering his parole application, he is not necessarily alleging that the decision denying him parole was wrong. Rather, the allegations relating to incorrect information demonstrate the kinds of issues Johnson would have addressed had he been permitted to speak at his hearing.

At bottom, Johnson's § 1983 challenge is a narrow one. He asserts procedural and substantive due process violations in connection with the procedures used during his parole hearing—he does not challenge the decision itself. Since a ruling in his favor would not necessarily invalidate the actual parole decision, Johnson's § 1983 suit is consistent with principles established in this Court's prior holdings. The Sixth Circuit correctly held that his claim is not barred, and that *sua sponte* dismissal of his claim was error.

B. Dotson's claim is proper under § 1983 because, if successful, it will not invalidate any decision.

The propriety of Dotson's action is even clearer. Indeed, the decision in his case was unanimous. Dotson's challenge does not involve a parole decision or any other decision related to fact or duration of confinement, at all. *Dotson*, 329 F.3d at 471. Rather, Dotson challenges the retroactive application of Ohio's parole-eligibility rules to his sentence. If Dotson wins, he simply becomes *eligible* for parole sooner. He is not guaranteed an earlier release or even a new parole

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to seek nominal damages. *E.g., Carey v. Piphus*, 435 U.S. 247 (1977).

hearing, nor is any past parole decision called into question. All of the reported circuit cases addressing this similar issue ruled as the Sixth Circuit did. *E.g., Anyanwutaku*, 151 F.3d at 1055-56.

Considering the implications of Dotson's success confirms that his § 1983 action is permissible. Dotson was eligible for and denied parole in 1995 and was scheduled for a second parole hearing in 2005. On March 1, 1998, the Ohio Parole Board adopted new guidelines for parole. Two years later, at his "halfway review," Dotson was informed that because of the new guidelines, he would not be again eligible for parole until 2012, and that his 2005 hearing would be merely another review hearing. If successful on his § 1983 claim, however, Dotson merely would be *eligible* to be considered for parole at his 2005 hearing. *Dotson*, 329 F.3d at 465-66. No decision would be invalidated, and because parole in Ohio is discretionary, there would be no guarantee that Dotson would be released early. Dotson simply would earn a "ticket to get in the door to the parole board." *Anyanwutaku*, 151 F.3d at 1056.

III. *MUHAMMAD v. CLOSE* IS IRRELEVANT TO THE ISSUES PRESENTED HERE.

Petitioners urge the Court to accept this case as a companion to the recent grant of *certiorari* in *Muhammad v. Close*, Case No. 02-9065, *cert. granted*, 123 S. Ct. 2573 (June 16, 2003). (Pet. 26.) But that case differs significantly from ours, and neither is helpful in analyzing the issues presented by the other.

Muhammad concerns conditions of confinement, not parole procedures. There, a prisoner brought a § 1983 challenge to prison conditions, claiming that a guard at his prison facility falsely charged the prisoner with misconduct in retaliation for the prisoner's exercise of his First Amendment rights. This Court granted *certiorari* to determine (1) whether a plaintiff who wishes to bring a § 1983 suit challenging only the

conditions, rather than the fact or duration, of his confinement, must satisfy the favorable termination requirement of *Heck v. Humphrey*, and (2) whether a prison inmate who has been, but is no longer, in administrative segregation may bring a § 1983 suit challenging the conditions of his confinement (*i.e.*, his prior placement in administrative segregation) without first satisfying the favorable termination requirement of *Heck*.

Nothing at issue here would be helpful to understanding the issues presented in *Muhammad*. In *Muhammad*, the prisoner's § 1983 challenge was premised on a challenge to the merits of the underlying decision charging him with misconduct, *i.e.*, that the misconduct charge was, in fact, wrong because it was retaliatory. The question is whether *Heck*'s "favorable termination" requirement is applicable to that claim. Here, Respondents do not challenge their confinement, sentence or any disciplinary or parole decision; the challenge is purely procedural. Heck's favorable termination requirement has "no application at all" to Respondents' claims. *Spencer*, 523 U.S. at 17.

In addition, granting *certiorari* and consolidating this case with *Muhammad* would serve only to disrupt the briefing and argument schedule in that case, where merits briefs already have been filed, with little or no benefit to the Court. The parties' briefs would address entirely different factual scenarios, different issues, and different rules of law. Any resultant consolidated decision would likely cover two significantly different areas of *Heck*-related jurisprudence.

At best, if Petitioners' characterization of *Muhammad*'s impact to this case is correct, a summary disposition order, not a grant of *certiorari*, might be appropriate. *E.g.*, *Board of Trustees of the Univ. of Illinois v. Doe*, 119 S. Ct. 2016 (1999). But even that solution may add little value to the issues presented here. Because of the fact-bound nature of § 1983 challenges to parole procedures and the widely varying scenarios presented in *Muhammad* and *Dotson*, the Court's

decision in *Muhammad* is unlikely to have any impact on the viability of Respondents' § 1983 claims.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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No. 03-287

In The Supreme Court Of The United States

REGINALD WILKINSON, Director, et al.,
Petitioners,

v.

WILLIAM DWIGHT DOTSON, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Petitioners, Ohio prison officials, along with sixteen *amici* States, ask the Court to resolve lower-court confusion regarding the scope of the "favorable termination requirement" of *Heck v. Humphrey*, 512 U.S. 477 (1994), which bars a prisoners from filing a claim under 42 U.S.C. § 1983 if success on the claim would "necessarily imply the invalidity of his conviction or sentence . . . unless . . . the conviction or sentence has already been invalidated." *Id.* at 487. Specifically, Petitioners seek review of a Sixth Circuit decision that concluded that *Heck* does not bar claims challenging parole procedures where success on those claims would not necessarily guarantee speedier release for the prisoner, but instead would give him only a new parole hearing. *Dotson v. Wilkinson*, 329 F.3d 463 (6th Cir. 2003) (en banc), Pet. App. 4a, 17a.

Respondents' brief shows precisely why review is needed here, as their entire argument rests upon the same mistaken premise adopted by the Sixth Circuit below and by other errant circuits: they assume that a State's parole decision is somehow not "invalidated" by a federal court when a federal court (1) declares that the procedures at a parole hearing were unconstitutional, and in effect (2) vacates the resulting denial of parole and orders the State to give a prisoner a new hearing with better procedures. Such a result does not constitute "invalidation" of the first hearing, according to Respondents—and according to the Sixth Circuit and like-minded circuits—because the prisoner might still be denied parole after a second hearing, so the prisoner will not necessarily get out of prison earlier.

In sharp contrast to that narrow view of "invalidation," Petitioners believe—as some circuits do, and as the dissent below does—that this Court adopted a different rule of law in *Edwards v. Balisok*, 520 U.S. 641 (1997). In

our view, *Balisok* means that a State parole hearing would be "invalidated" if it were vacated, even though a prisoner purports to challenge only the "parole procedures, not the parole decision" of the first hearing, and even though a new hearing might reach the same result of denial-of-parole. It does not matter, in our view, that a prisoner might not "necessarily" achieve earlier *release*. If a parole decision is declared inoperative—*i.e.*, is *invalidated*—then a prisoner achieves a result that he should not be allowed to achieve in a Section 1983 claim, so any Section 1983 claim aimed at such a result should be barred by *Heck* and *Balisok*.

But more important, whatever side has the better view of what the Court meant by "invalidate" in *Balisok*, that legal dispute is a live one, both in this case and in the circuits, and it warrants review. Respondents seek, at every turn, to sidestep this legal dispute over the meaning of "invalidation." They fail to acknowledge how that legal question divided the court below, and how that legal question—not mere factual differences or a red-herring process-versus-result distinction—divides the circuits. Once this critical question of "invalidation" is brought back into focus, then the lower court's conflict with *Balisok*, and the circuit split, shine brightly, and the attendant need for certiorari is visible.

A. This case squarely presents the question of what it means to "imply the invalidity" of a parole decision, under *Balisok*, and the Sixth Circuit was plainly divided on that legal issue.

Respondents insist that this case involves a factbound application of settled law. In their view, the settled law is straightforward: if "a prisoner brings a § 1983 suit 'for using the wrong [parole] procedures, not for reaching the wrong result, and if that procedural defect did not necessarily imply the invalidity of the [parole decision],' then the lawsuit is not barred." Brief in Opposition ("Opp.") at 1, quoting *Spencer*

v. Kemna, 523 U.S. 1, 17 (1998). This rule has been uniformly applied in this Court and in the circuits, they say, and the different results below are explained entirely by fact-specific differences among prisoners' claims. Indeed, they argue that factual issues even explain away the division in the court below, as "even dissenting judges in [Respondent] Johnson's case did not proffer a different rule of law, but rather interpreted the factual allegations of Johnson's claim differently" from the majority. Opp. at 2.

Respondents' entire approach, however, simply leaps over the critical question presented in this case: what *legal standard* determines whether a claim "implies the invalidity" of a parole decision? That is undoubtedly a question of law, not fact, and it is the *that* question—not a difference in factual characterizations, nor any difference between challenges to parole "procedures" as opposed to parole "decisions"—that deeply divided the court below. Indeed, both the majority and dissenting opinions showed that they viewed their own internal debate, as well as the debate in the circuits, as a legal question centered on the meaning of this Court's precedent. *See* Pet. App. 8a ("somewhat confusing Supreme Court cases govern the issue here, and our sister circuits have struggled with application of their holdings"); Pet. App. 20a-21a ("the majority opinion has adopted an overly broad 'earlier release' test"); Pet. App. 25a ("I believe that the majority has adopted a broad-based rule that was rejected by the Supreme Court in *Edwards [v. Balisok]*.").

The majority and dissent split over what *Balisok* means, and thus split over what *type* of § 1983 claims trigger the *Heck* bar. In particular, they disagreed regarding what types of claims would, if successful, "necessarily imply the invalidity of [the prisoner's] conviction or sentence." The majority adopted a bright-line, but erroneous, rule that allows a prisoner to use § 1983 to challenge parole procedures, including the procedures used in his particular parole

hearing, as long as the prisoner will not *automatically obtain earlier release* as a result of winning his § 1983 suit. Pet. App. 17a ("A successful challenge will only 'necessarily imply' the invalidity of a prisoner's conviction or sentence if it will inevitably or automatically result in earlier release.") This "earlier release" test means that the *Heck* bar does not prohibit a claim such as Respondent Johnson's, even though he seeks to *void the decision denying him parole*. *See* Pet. App. 18a ("the consequence [of success on his claim] will be a new discretionary parole hearing.")

The majority relied on two key principles—both issues of law, not factbound details—to conclude that a suit that seeks to set aside a parole denial is not one seeking to "invalidate," or to imply the invalidity of, a state parole decision. First, the court stressed that parole is a *discretionary* matter in Ohio, so the new hearing might reach the same result, leaving the prisoner's term of confinement unchanged. Pet. App. 17a. Second, the court said that *Heck* simply does not protect a "decision of the Ohio Parole Board," or of any administrative body, from invalidation, as the court held that *Heck's* protection of a State's "'judgment' properly refers only to the decision of a convicting court." Pet. App. 35a n.2.

The dissent strongly, and rightly, disagreed with the majority's "earlier release" test and with both of the above corollary principles, because the majority's view, on all those scores, conflicts head-on with *Balisok*. The dissent said that the majority "overreaches when it suggests that, because Johnson's and Dotson's procedural challenges will result in nothing more than a new hearing, their claims must be allowed to proceed." Pet. App. 30a. The dissent explained that the *Heck* bar is not triggered only by claims for automatic, earlier release; instead, the bar is triggered whenever a prisoner asks a federal court to "'set aside' or 'reverse' the denial of parole in an individual case." Pet.

App. 28a. As the dissent noted, under *Balisok*, it is the impact on the judgment, not on the term of confinement, that matters. Pet. App. 21a.

The dissent explained precisely how the majority's opinion conflicted, in several ways, with *Balisok*. First, *Balisok* dealt "with the judgment of an administrative body," Pet. App. 24a, as the prisoner in that case sought to challenge the *administrative* disciplinary procedures that the *prison system*—not a sentencing court—used to deprive him of good-time credits. *See Balisok*, 520 U.S. at 643, 648. The Court, of course, barred the claim in *Balisok*, protecting that administrative decision. Second, *Balisok* also rejected the other basis for the Sixth Circuit's ruling: the notion that a discretionary decision is not "necessarily" invalidated when it is set aside due to procedural flaws, because the discretionary process might reach the same result after a new hearing. As the dissent explained, a "similar argument was advanced" in *Balisok*, "to the effect that a ruling in [the prisoner's] favor on his § 1983 procedural attack would not necessarily imply the invalidity of the loss of his good-time credits because the Washington courts could still uphold the administrative determination once the procedural errors were corrected." Pet. App. 24a, citing *Balisok*, 520 U.S. at 647. "But the Court clearly rejected this argument" in *Balisok*. Pet. App. 24a, citing *Balisok*, 520 U.S. at 648. Indeed, if the majority were right, then it is hard to see how *any* parole decision in Ohio—or in any State that has a discretionary system, as most do—will be protected by the *Heck* bar, as prisoners will always get a new hearing with an indeterminate outcome. Pet. App. 31a.

Most important, just as *Balisok* had already rejected the twin underpinnings of the Sixth Circuit's reasoning, so, too, does *Balisok* conflict with the Sixth Circuit's ultimate holding—that prisoners may use § 1983 to attack a parole decision, as long as they ask for a "new hearing" and not a

"reversal" of the decision. The prisoner in *Balisok* was barred from attacking the deprivation of his good-time credits even though a successful attack would gain him a *new hearing*, not necessarily a reinstatement of the disputed credits. *Balisok* explained that the prisoner's claim, if successful, would "necessarily imply the invalidity of the deprivation of his good-time credits," and this was so because his complaint was the type that would entitle him to either reinstatement of the credits *or a new hearing*. *Balisok*, 520 U.S. at 647 ("This is an obvious procedural defect, and state and federal courts have reinstated good-time credits (*absent a new hearing*) when it is established.") (emphasis added), citing, *e.g.*, *Kingsley v. Bureau of Prisons*, 937 F.2d 26, 27, 31 (2d Cir. 1991). Not only did the Court expressly refer to a "new hearing" as a likely outcome of such claims, but it also cited, in support of this proposition, cases such as *Kingsley*—a case in which a federal court ordered a prison warden to reinstate a prisoner's good-time credits "unless a new hearing is held at which" the procedural defects at issue were cured. *Kingsley*, 937 F.2d at 27; *see also Dumas v. State*, 654 So. 2d 48, 49 (Ala. Crim. App. 1994) (prisoner was "entitled to a new disciplinary hearing"); *Mahers v. State*, 437 N.W.2d 565, 568-69 (Iowa 1989) (ordering rehearing while stressing that new hearing might reach same result).

Thus, in the dissent's view (and in ours), Johnson seeks to achieve exactly the type of relief that *Balisok* foreclosed: a declaration that his denial-of-parole hearing was invalid, and a new hearing with different procedures. The dissent did not "interpret[] the factual allegations of Johnson's claim differently" from the majority, *see* Opp. at 2, as both sides understood that Johnson wanted to void the

result of his hearing and get a new one. They disagreed on *whether Balisok* allows such attacks.[1]

In sum, the question is *whether* claims demanding a new hearing "necessarily imply the invalidation" of the first hearing, and should thus be barred by *Heck*. Petitioners and the dissent believe that the answer is clearly yes, while the Sixth Circuit has held that the answer is no. But whoever is right on that score, Respondents are surely wrong to deny that the question is on the table.[2]

---

[1] The majority and the dissent also split over the legal rule to apply to Dotson's claim, as the dissent said that the majority applied the wrong rule to both Dotson and Johnson. Pet. App. 23a, 25a. However, the dissent concluded that a "proper application" of this Court's precedents "coincides with the majority's decision on Dotson's claim." Pet. App. 30a. That is because the dissent believed that Dotson did not seek to undo his 1995 denial of parole, and that he wished only to challenge the procedures to be used in the future, in his already-scheduled 2005 hearing. Pet. App. 29a. But Dotson's complaint plainly said otherwise, as he prayed for "a prompt and immediate parole hearing." *See also Dotson v. Wilkinson*, 300 F.3d 661, 663 (6th Cir. 2002) (panel decision), Pet. App. 40a (noting that Dotson sought "an injunction ordering a new eligibility hearing."). Thus, this corrected characterization of Dotson's claim should bar his suit under the dissent's (and *Balisok's*) rule of law. In addition, to the extent that Dotson's claim arguably differs from Johnson's, the presence of both makes this an ideal candidate for review, as the Court could address the issues raised in both.

[2] While Respondents' attempt to sidestep the legal debate over "invalidity" suffuses their entire brief, their avoidance of the question is perhaps best captured in their restatement of the question(s) presented. They frame the issue as whether a prisoner can bring a § 1983 claim challenging the procedures at his parole proceeding "*where* such a challenge, if successful, *would neither invalidate* a parole decision" nor affect the duration of the prisoner's sentence. That "question," however, assumes the answer to our second question, which asks *whether* a federal court invalidates a parole decision when it vacates, or declares void, a first parole decision, and orders a new, second proceeding.

B. The circuits are split over what it means to "imply the invalidity" of a parole decision, and that split is a matter of law, not a result of factual differences.

Just as the majority and dissent split over the legal question of whether a prisoner may use a § 1983 claim to vacate a parole decision and demand a new hearing, so, too, are the circuits split along the same axis. Some circuits, such as the Sixth Circuit below, apply a "guaranteed early release test." These circuits allow such claims to proceed as long as the prisoner seeks only a new hearing, so that the claim will not "automatically result in [] a speedier release from prison." *Anyanwutaku v. Moore*, 151 F.3d 1053, 1057 (D.C. Cir. 1998); *Johnson v. Litscher*, 260 F.3d 826, 831 (7th Cir. 2001) (claim would "not necessarily" result in restoration of good-time credits and earlier release).

In sharp contrast, other circuits forbid any claims that challenge parole decisions, even if those claims are framed as challenges to the "procedure," not the "result," of the decision, and even if success on the claim would not necessarily lead to earlier release. *See, e.g., Butterfield v. Bail*, 120 F.3d 1023, 1024-25 (9th Cir. 1997); *Vann v. Oklahoma State Bureau of Investigation*, 28 Fed. Appx. 861 (10th Cir. 2001); *Crow v. Penry*, 102 F.3d 1086, 1087 (10th Cir. 1996) (*Heck* "applies to [all] proceedings that call into question the fact or duration of parole or probation").

Respondents try to explain away this split by alleging that factbound differences account for the different results, and by arguing that the conflicting decisions are harmonized by a rule that allows attacks on parole *procedures*, as long as a prisoner does not challenge a parole *outcome*. Opp. at 9. Respondents' purported "harmonization" of the split suffers at least two major flaws. First, by relying solely on the procedure/outcome distinction, Respondents essentially eliminate the "invalidity" issue, even though *Balisok* said

that even *procedural* claims are barred if they "imply the invalidity" of a parole decision. *See Balisok*, 520 U.S. at 646. All that a prisoner need do, to satisfy Respondents' (and the Sixth Circuit's) rule, is stop short of asking the federal court for reversal-on-the-merits of the parole decision. Second, Respondents' suggested harmonization fails because the cases show a clear legal split that cannot be explained away by factual differences.

The Ninth Circuit's *Butterfield* decision perhaps best demonstrates both flaws in Respondents' attempt to harmonize the split. That case both illustrates the problem with Respondents' proffered procedure/outcome distinction, and is also irreconcilable with the decision below. Respondents assert that Butterfield "challenged the outcome reached by the parole board." Opp. at 10. But *Butterfield* was a purely procedural challenge, as the prisoner claimed that false information was included in his parole file, and he sought "money damages rather than parole as a remedy." *Butterfield*, 120 F.3d at 1025. He did not even appear to demand a new parole *hearing*, let alone a court-ordered reversal of the outcome.

The Ninth Circuit nevertheless rejected Butterfield's procedural challenge, holding that any "challenge to the *procedures* used in the denial of parole *necessarily implicates the validity of the denial of parole*," and is thus barred. *Butterfield*, 120 F.3d at 1024 (emphasis added). Under *Butterfield*, then, the "implication of invalidity" does not turn on whether a prisoner seeks to "reverse" the outcome. Rather, *any* claim seeking a declaration that a particular decision was procedurally flawed *necessarily implies* the invalidity of the decision. Thus, the "fact that Butterfield [sought] money damages rather than parole as a remedy does not alter this conclusion." *Id.* at 1025.

Therefore, Respondents are wrong to say that Butterfield "challenged the outcome" of his parole denial, and that success on his claim "would have invalidated the parole decision." Opp. at 10. The only sense in which Butterfield challenged the decision's "outcome" or "validity" is in the sense that his claim sought a declaration that the process was flawed. But, thus understood, *Butterfield* would bar Respondent Johnson's claim, as he not only wants a declaration that his hearing was flawed, but he seeks a new hearing. Conversely, Butterfield would surely be allowed to pursue his claim in the Sixth Circuit, as he did not seek "automatic early release," but wanted only damages. These irreconcilable holdings demonstrate a clear circuit split.

Moreover, the Tenth Circuit also bars claims that *imply* the invalidity of a parole decision, based on procedural flaws, even where the prisoner seeks only damages, not early release or a new hearing. *Vann*, 28 Fed. Appx. at 864 (damages claim barred because it "would necessarily cast doubt on the parole decision itself"); *Waeckerle v. Oklahoma*, 37 Fed. Appx. 395 (10th Cir. 2002) ("civil claim for damages amount[ed] to a collateral attack" on the parole decision). Respondents argue that these claimants, too, attacked the "outcome" of their parole decisions, but they did so only in the sense that a successful damages claim *implies* a flawed decision; they did not ask for the decisions to be set aside. Surely the Tenth Circuit would not allow claims such as Respondents' to proceed; conversely, the Sixth Circuit's "early release" test allows damages-only claims to proceed.

In sum, the circuit split is real, with consequences for prisoners and prison officials alike, and it should be resolved.

CONCLUSION

For the reasons above and in the Petition, the Petition should be granted.

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Pursuant to the Court's Rule 15.8, the Attorney General of Ohio submits this Supplemental Brief for the Petitioners. We do so because we believe that the Petition was likely held for the decision in *Muhammad v. Close,* No. 02-9065 (February 25, 2004). This Brief discusses the effect of that decision—or, more precisely, the lack of such an effect—on the question presented here. As explained below, yesterday's *Muhammad* decision did not offer, even indirectly, any further guidance on our question presented. Thus, we respectfully suggest that the need for review in this case remains strong, and that it would serve no purpose to remand this case for reconsideration in light of *Muhammad.*

1. The question presented here is whether prisoners may use 42 U.S.C. § 1983 to challenge the procedures used in parole hearings, where success on the claim would not *automatically* result in the prisoner's earlier release, but would entitle the prisoner to a new hearing, at which he *might achieve* such earlier release. *See generally* Petition. Ohio urges that such claims are blocked by the "favorable termination requirement" of *Heck v. Humphrey*, 512 U.S. 477 (1994), which bars a prisoners from filing a claim under Section 1983 if success on the claim would "necessarily imply the invalidity of his conviction or sentence . . . unless . . . the conviction or sentence has already been invalidated." *Id.* at 487. As the Petition and Reply detailed, the Circuits are deeply split on the application of *Heck* to parole-related claims, *see* Pet. at 9-15; Reply at 8-10, and many States, understandably, wish to see the question answered. *See* Brief amicus curiae of State of Alabama, et al.

2. In *Muhammad*, the Court addressed the application—or, as it turned out, the non-application—of the *Heck* bar to a claim that challenged a prison disciplinary proceeding, but that proceeding had affected only the conditions of the prisoner's confinement, not the duration of his sentence. *Muhammad,* slip op. at 5. In *Muhammad,* the prisoner

(Petitioner Muhammad) was placed in "special detention," or segregation within the prison, and he was deprived of privileges. *Id.* But "no good-time credits were eliminated" by the challenged proceeding, so nothing about that proceeding could have affected Muhammad's duration of sentence. His Section 1983 claim, which attacked that proceeding, "could not therefore be construed as seeking a judgment at odds with his conviction or with the State's calculation of time to be served in accordance with the underlying sentence." *Id.* at 6. Thus, *Muhammad* did not address *Heck's* application to claims in which prisoners attack parole proceedings, as parole proceedings do of course affect "the State's calculation of time to be served."

3. While *Muhammad* was pending, it was possible that the case might offer guidance for cases involving parole or good-time credits, as the Respondent there had argued to the Court that "Muhammad would be entitled to restoration of some good-time credits," thus affecting the duration of his sentence. *Id.* But the Court did not address this "eleventh-hour contention," as it was waived in the lower courts and was first raised in this Court. *Id.* Ohio suggests that this once-potential good-time issue, had it survived, supplied the stronger link between *Muhammad* and this case, as opposed to any more abstract linkage between the (non)application of the *Heck* bar to conditions-of-confinement cases (such as *Muhammad*) and the application of *Heck* to parole cases.

4. In light of the above, Ohio respectfully suggests not only that the need for review remains strong in our case (for the reasons in the Petition and Reply), but also that such review should be plenary review in this Court. That is, Ohio suggests that it would serve little or no purpose for the Court to grant the Petition, vacate the judgment below, and remand to the Sixth Circuit for reconsideration in light of *Muhammad*. The *Muhammad* decision, by distinguishing between challenges to conditions-of-confinement, and

challenges concerning duration-of-sentence, offers no new guidance on the issues that divided the Sixth Circuit in its *en banc* decision, and offers no new guidance to the other Circuits that share our Circuit's side of the Circuit split.

To be sure, yesterday's *Muhammad* decision does restate principles that the Court explained in *Heck* and in *Edwards v. Balisok*, 520 U.S. 641 (1997). In our view, the Court's plain restatement of those principles in *Muhammad* merely confirms the need for this Court to correct the Sixth Circuit's misreading of *Balisok*. For example, the Sixth Circuit reasoned here that the *Heck* bar did not apply because, in its view, *Heck* simply does not protect a "decision of the Ohio Parole Board," or of any administrative body, from invalidation. Pet. App. 35a n.2. The court instead limited *Heck's* protection "to the decision of a convicting court." *Id.* By contrast, *Muhammad* reminds us that *Balisok* applied the *Heck* bar to a claim that alleged a "procedural defect in a prison's *administrative process*." *Id.* at 2 (emphasis added). *Muhammad* also described the *Heck* bar as applying to claims challenging "the State's calculation of time to be served in accordance with the underlying sentence," *id.* at 6, and of course, such "calculations" are almost universally done administratively, long after initial sentencing by the convicting court.

Similarly, *Muhammad* also reflects *Heck's* and *Balisok's* application to cases where the prisoner's duration-of-sentence *could* be affected, even though the effect is still uncertain. *See id.* at 2 (*Heck* is not "implicated by a prisoner's challenge that *threatens* no consequence for . . . the duration of his sentence.) (emphasis added). This contrasts with the Sixth Circuit's mistaken view that *Heck* does not apply as long as the prisoner will not *automatically obtain earlier release* as a result of winning his Section 1983 suit, even if the prisoner would gain a new hearing that *might* shorten his sentence. *See* Pet. App. 17a (1983 claim "will

only 'necessarily imply' the invalidity of [a] conviction or sentence if it will inevitably or automatically result in earlier release.").

Nevertheless, even though *Muhammad* restates principles that demonstrate the error of the Sixth Circuit's reasoning, Ohio suggests that remand is not warranted for the simple reason that none of these principles were newly announced or extended in *Muhammad*, as all were plainly established by *Balisok*, if not already by *Heck*. Nor is this a case in which the court below committed a minor error in application of law to facts, or in characterization of facts, so that remand would allow a quick correction. This was a published *en banc* decision, and the court split 6-4 over the meaning of *Balisok* and the legal tests to apply, and nothing in *Muhammad* sheds further light on the issues that divided the court below (and that also divide the Circuits).

* * *

For the above reasons, the need for review remains strong after *Muhammad*, so the Petition should be granted.

Respectfully submitted,

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Commonwealth of Virginia

QUESTIONS PRESENTED

1. Does *Heck v. Humphrey* permit a prisoner to bring a § 1983 action claiming that his parole proceedings violate due process, even though success on the merits of this claim would result only in a new parole hearing and would not necessarily guarantee earlier release from prison?

2. Does a federal court judgment ordering a new parole hearing "necessarily imply the invalidity of" the decision at the previous parole hearing, for purposes of *Heck v. Humphrey*?

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BRIEF OF AMICI CURIAE

The States of Alabama, Alaska, Arkansas, Delaware, Hawaii, Illinois, Kansas, Mississippi, Missouri, Nebraska, Nevada, Oregon, Pennsylvania, South Dakota, Utah, and Virginia submit this brief as amici curiae, pursuant to Supreme Court Rule 37.4, in support of the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit filed in this case by petitioners Reginald Wilkinson and Margarette Ghee.

INTEREST OF AMICI CURIAE

In *Heck v. Humphrey*,[1] this Court adopted the "favorable termination" requirement for § 1983 actions. "[W]hen a state prisoner seeks damages in a § 1983 suit," this Court held, "the district court must consider whether a judgment in favor of the plaintiff *would necessarily imply the invalidity of his conviction or sentence.*[2] "[I]f it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated."[3]

Subsequently, in *Edwards v. Balisok*,[4] this Court held that the favorable termination requirement of *Heck* barred a state prisoner's § 1983 claim that a disciplinary hearing violated due process. Even though the prisoner was not challenging the outcome of the hearing — just the procedures used to reach it — the

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[1] 512 U.S. 477 (1994).

[2] *Id.* at 487 (emphasis added).

[3] *Id.*

[4] 520 U.S. 641 (1997).

Court held that "the nature of the challenge to the procedures [were] such as necessarily to imply the invalidity of the judgment."[5]

The States who file this amicus brief have a keen interest in clarifying the fields of application of both *Heck v. Humphrey* and *Edwards v. Balisok*. The States stand at the increasingly busy "intersection of the two most fertile sources of federal-court prisoner litigation — the Civil Rights Act of 1871 ... and the federal habeas corpus statute."[6] The amici States have each been affected by *Heck* and *Balisok* and have each struggled with lingering questions about the extent to which these decisions may bar inmate lawsuits brought under 42 U.S.C. § 1983. Amici ask that this Court grant certiorari in this case to resolve these issues concerning the proper application of *Heck* and *Balisok*.

STATEMENT OF THE CASE

1. Petitioner William Dwight Dotson is serving a life sentence in Ohio prison for aggravated murder. His first parole hearing was held in 1995, but he was denied parole. At the time, his next parole hearing was scheduled for 2005, but in 1998, the Ohio Adult Parole Authority revised its guidelines in such a manner that Dotson was not likely to be paroled until 2007 at the earliest.

Dotson sued in federal district court under § 1983, claiming that the Parole Board had violated his rights by applying the new guidelines to him. Dotson sought a declaration that he was entitled to be processed under the old guidelines. He also sought an injunction

[5] *Id.* at 645.

[6] *Heck*, 512 U.S. at 480.

requiring the Parole Board to give him a "prompt and immediate parole hearing" so that he could be re-evaluated under the old guidelines.

2. Petitioner Rogerico J. Johnson is serving a 10-30 year sentence in Ohio prison for aggravated robbery. His first parole hearing was held in April 1999. He, too, was denied parole. Johnson claims that the hearing violated his rights in several ways. He claims that just one Parole Board member held the hearing, while Ohio law requires that both a Board member and a Parole Board hearing officer conduct a hearing. He also claims that he was not allowed to speak on his own behalf. Finally, he claims that the Board member based the decision to deny him parole on crimes for which he was never charged or convicted.

Like Dotson, Johnson sued in federal district court under § 1983. He seeks to set aside the decision denying him parole and to have an immediate, new hearing.

3. In both cases, the district courts dismissed the § 1983 actions under the favorable termination requirement of *Heck v. Humphrey*. The prisoners then appealed. Their appeals were ultimately consolidated and heard en banc by the United States Court of Appeals for the Sixth Circuit.[7] The Sixth Circuit reversed.

The majority of the en banc panel reasoned that the most each prisoner would gain by prevailing on his § 1983 lawsuit was a new hearing, and not necessarily an earlier release.[8] A § 1983 claim "necessarily implies

[7] *Dotson v. Wilkinson*, 329 F.3d 463 (6th Cir. 2003) (en banc).

[8] *Id.* at 470.

the invalidity of a prisoner's conviction or sentence," the court held, only if it "will inevitably or automatically result in an earlier release."[9] The dissent, citing *Balisok*, maintained that *Heck* barred all § 1983 claims that would "imply the invalidity of any state criminal judgments relating to the length of a prisoner's incarceration," whether or not a favorable resolution of the claim would itself entitle the prisoner to an earlier release.[10]

REASONS FOR GRANTING THE WRIT

I. *Heck v. Humphrey* and *Edwards v. Balisok* Have Engendered Significant Confusion in the Lower Federal Courts, Which Can Be Rectified Only By This Court on Certiorari Review.

Though *Heck v. Humphrey* was doubtless intended to clarify the interplay between 42 U.S.C. § 1983 and the federal habeas statute, the ensuing nine years have shown that the "necessarily implies" language of *Heck*[11] may have raised more questions than it answered. Similarly, the extension of the *Heck* doctrine in *Balisok*, though beneficial to the States in many ways, has given rise to its own controversies. The federal courts are in conflict about how *Heck* and *Balisok* apply to prisoner challenges to parole procedures. The existence of a circuit split is inarguable; there appear even to be splits among different panels within the same circuits.[12] In addition, the federal courts are in

[9] *Id.* at 471.

[10] *Id.* at 473.

[11] *Id.*

[12] *See* Pet. 9-15, 26-28.

conflict about how *Heck* and *Balisok* apply to several other issues of importance to the States. These conflicts cry out for doctrinal resolution that can only be had through certiorari review.

A. The Fourth and Eleventh Circuits have issued conflicting opinions regarding whether post-conviction § 1983 actions seeking DNA evidence for testing are barred by the favorable termination requirement of *Heck*.

The permutations of confusion engendered by *Heck* and *Balisok* are manifold. The State of Alabama has recently struggled with one of these permutations — whether § 1983 may be used by inmates as a vehicle to obtain DNA testing. In *Bradley v. Pryor*,[13] the Eleventh Circuit refused to dismiss a death row inmate's § 1983 claim for DNA evidence, holding that a judgment in favor of the inmate would not "'necessarily imply the invalidity of his conviction or sentence.'"[14] Even still, the panel in *Bradley* expressed some equivocation in its decision. Judge Birch, in a special concurrence, stated, "I concur *dubitante*."[15] He opined that the judgment of the district court was likely due to be affirmed on a separate ground — failure to state a claim — though he believed a remand was required to properly treat that issue.[16] Chief Judge Edmondson clearly ascribed significance to the fact that the plaintiff, who had been convicted of capital murder, had not asked a federal court to stay his impending

[13] 305 F.3d 1287, 1290-91 (11th Cir. 2002).

[14] *Id.* at 1291 (quoting *Heck*, 512 U.S. at 487).

[15] *Id.* (Birch, J., specially concurring).

[16] *Id.*

execution.[17] It is unclear how this factor weighed in the *Heck* calculus, if at all, in *Bradley*.

The Eleventh Circuit decided *Bradley* with full knowledge of the contrary holding of the Fourth Circuit in *Harvey v. Horan*.[18] In that case, a divided panel determined that a prisoner's § 1983 suit seeking DNA testing was precluded by *Heck* and that the action could proceed, if at all, only as a habeas petition. The *Harvey* majority saw the claim of the plaintiff in that case for what it truly was: an attempt to impugn a criminal conviction under the auspices of a § 1983 civil action. The Fourth Circuit rejected this stratagem, repeating the admonition of this Court in *Heck* "that civil tort actions are simply 'not appropriate vehicles for challenging the validity of outstanding criminal judgments.'" [19] That holding notwithstanding, the Eleventh Circuit in *Bradley* was more persuaded by the minority view expressed in *Harvey*, which rejected the majority's interpretation of *Heck*.[20]

The claims presented in *Bradley* and *Harvey* were virtually identical. In those cases, both plaintiffs sought DNA evidence that held no value to them other than the possibility of exonerating them of crimes for which they were long ago convicted. The Fourth Circuit rejected this ploy under the authority of *Heck*.

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[17] *Id.* at 1291 (Edmondson, C.J., specially concurring).

[18] 278 F.3d 370 (4th Cir. 2002).

[19] *Id.* at 374-75 (quoting *Heck*, 512 U.S. at 484). *See also Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir. 2002) (holding the same).

[20] 305 F.3d at 1290 (agreeing with the analysis of Judge King in *Harvey*, 278 F.3d at 382-83 (King, J., concurring in part and concurring in the judgment).

In contrast, the Eleventh Circuit, perceiving a distinction between obtaining DNA evidence and actually putting it to use, interpreted *Heck* to allow a civil lawsuit whose thinly veiled purpose was to find a way to undermine the plaintiff's criminal conviction.

The fact that two federal circuits have reached polar opposite results, each after analyzing the operative scope of *Heck*, shows that the *Heck* favorable termination requirement may be unworkable or, at the very least, in need of clarification or modification by this Court. In particular, the "necessarily implies" language of *Heck*[21] — the flashpoint of controversy surrounding the application of *Heck* and *Balisok* — may require reexamination or reformulation.

B. The Seventh and Eleventh Circuits have issued conflicting opinions regarding whether prisoners' § 1983 claims alleging extradition improprieties are barred by *Heck*.

Another circuit split exists concerning whether prisoners can maintain causes of action under § 1983 based on alleged improprieties in the extradition process. In *Knowlin v. Pataki*,[22] the Seventh Circuit upheld the dismissal of just such a claim, where the order of the lower court was premised on *Heck*. The *Knowlin* court held that, in order to state a cause of action, the plaintiff in that case would necessarily have had to prove damages stemming from something other than his extradition from one state to another. To do so, the court held, the plaintiff had to demonstrate the invalidity of the parole revocation that led to his

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[21] 512 U.S. at 487.

[22] 207 F.3d 907 (7th Cir. 2000).

extradition. Such proof, however, would run afoul of *Heck*, and the plaintiff's claim was consequently barred.[23] In unanimously upholding the dismissal order of the district court, moreover, the Seventh Circuit followed its holding in *Antonelli v. Foster*,[24] which likewise affirmed the dismissal of an extradition-based § 1983 claim on the authority of *Heck*.

Once again, however, the Eleventh Circuit has reached a different conclusion. In *Harden v. Pataki*[25], the Eleventh Circuit ruled that a prisoner's § 1983 suit challenging the manner of his extradition was not barred by *Heck*. Rejecting the reasoning of the Seventh Circuit in *Knowlin*, the Eleventh Circuit saw no means by which the plaintiff's § 1983 claims might vitiate his criminal conviction.[26] The court found it "implausible" that the plaintiff's claims would necessarily imply the invalidity of the extradition decision itself.[27]

Just as with the circuit split regarding DNA testing, these divergent opinions concerning the application of *Heck* to extradition-based § 1983 claims raise serious concerns and point up the need for greater clarity on this issue.

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[23] *Id.* at 909.

[24] 104 F.3d 899 (7th Cir. 1997).

[25] 320 F.3d 1289 (11th Cir. 2003).

[26] *Id.* at 1296, 1299 (describing the reasoning in *Knowlin* as "syllogistic" and "fundamentally flawed").

[27] *Id.* at 1297 n. 10.

C. Several federal circuits are split on whether Fourth Amendment unreasonable search and seizure claims asserted under § 1983 are barred by *Heck*.

The "necessarily implies" language of *Heck* — and particularly footnote seven[28] — has also produced a difference of opinion between several of the circuits on Fourth Amendment § 1983 claims. The decision of the Ninth Circuit in *Harvey v. Waldron*[29] aptly delineates the positions of the circuit courts on this issue. Ultimately, the Ninth Circuit sided with the Second and Sixth Circuits and applied *Heck* to a § 1983 claim alleging a Fourth Amendment violation. In doing so, the *Harvey* court rejected the dissimilar approach of the Seventh, Eighth, Tenth, and Eleventh Circuits, which had each recognized a general exception to the *Heck* rule for Fourth Amendment unreasonable search and seizure claims.[30]

The circuit split elucidated in *Harvey* only further illustrates the confusion engendered by *Heck* and its progeny. That a mere footnote in *Heck* could spawn two separate approaches to the same issue in seven of the federal circuits only demonstrates the need for greater clarity in this area. This case, especially when considered in conjunction with *Muhammad v. Close*,[31] presents an ideal platform for providing this much-needed clarity. This Court should, therefore, grant certiorari.

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[28] 512 U.S. at 487 n. 7.

[29] 210 F.3d 1008 (9th Cir. 2000).

[30] *Id.* at 1015-16.

[31] No. 02-9065, *cert. granted* June 16, 2003.

II. The *Heck* Rule Should Be Recast to Better Insulate State-Court Judgments and Administrative Decisions from Collateral Attacks Brought Under the Auspices of § 1983.

If certiorari is granted in this case, the amici States will argue for a more liberal application of *Heck* that would bar any § 1983 claims having no other realistic or practical purpose than to attack the validity of a state-court judgment or administrative decision. Adopting such a standard would do away with the unduly restrictive "necessarily implies" language of *Heck*, thereby ameliorating much of the confusion wrought by that decision. Effecting this change in the *Heck* rule will do much more than shield the States from the burdens occasioned by defending § 1983 actions. Adopting a more liberal application of *Heck* will also better fulfill the objectives underlying the *Heck* decision itself.

In *Heck*, this Court repeatedly expressed the importance of avoiding scenarios in which criminal judgments could be impugned by subsequent civil actions. This Court invoked "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments," stating that it "has long expressed ... concerns for finality and consistency and has generally declined to expand opportunities for collateral attack." [32] Yet, the "necessarily implies" standard employed in *Heck*, at least as it has been interpreted by some of the federal circuit courts, fails to shield state court convictions adequately. The same is true, post-*Balisok*, of state administrative decisions.

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[32] 512 U.S. at 484-85.

The decision of the Eleventh Circuit in *Bradley* is a perfect illustration of this point. Though it could hardly be argued the plaintiff in that case sought DNA testing for any purpose other that to eventually attack his criminal conviction, his § 1983 lawsuit was allowed to proceed. The Eleventh Circuit, by its rigid application of *Heck*'s "necessarily implies" language, considered only the immediate impact of Bradley's § 1983 claim — the post-conviction production of evidence — and not the downstream consequences of its ruling. In doing so, the *Bradley* court missed the forest for the trees. It is evident, as the Fourth Circuit appreciated in *Harvey*, that a § 1983 claim of this type, if not a direct assault, was at least a flanking maneuver to attack the validity of a state-court conviction. Such a lawsuit is repugnant to the principles underscored in *Heck*. Nonetheless, the Eleventh Circuit purported to follow *Heck* in allowing Bradley's claim to proceed under § 1983.

The same situation has unfolded in many other circuit court decisions, as outlined above. It appears some of the lower federal courts, in attempting to apply *Heck* and *Balisok*, have focused primarily on the "necessarily" aspect of the rule while neglecting the principles that undergird *Heck*. Thus, the "necessarily implies" aspect of *Heck*, with the benefit of hindsight, may have been an unfortunate choice of words. Though grounded in firm principles, this language has produced conflict amid the circuits with attendant inconsistent decisions that are not in step with the spirit of *Heck*.

The adoption of a more liberal *Heck* standard that looks to the practical effect as well as the necessary outgrowth of prisoners' § 1983 claims, however, would cure the deficiencies in the current state of the law.

For this reason, amici urge this Court to grant certiorari in this case and, furthermore, to consider reformulating the *Heck* rule.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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September 22, 2003

(12)

No. 03-287

In The Supreme Court Of The United States

REGINALD WILKINSON, Director, et al.,
Petitioners,

v.

WILLIAM DWIGHT DOTSON, et al.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: AUGUST 18, 2003
CERTIORARI GRANTED: MARCH 22, 2004

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[The following reproduction includes only selected docket entries.]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO (TOLEDO)
CIVIL DOCKET FOR CASE #: 3:00-CV-07303-DAK

Dotson v. Wilkinson et al.

DOCKET ENTRIES

Filing Date	#	Docket Text
05/12/2000	1	Complaint *with Jury Demand* (no summons and Magistrate Consent forms issued) against Margarette T. Ghee, John Kinkela, Reginald Wilkinson. Filed by pro se William Dwight Dotson.
07/24/2000	6	Motion to amend complaint *page 6 due to copying mistake* filed by pro se William Dwight Dotson.
08/07/2000	7	Opinion and Order: This action is dismissed pursuant to 28 USC 1915(e); further the court certifies pursuant to 28 USC 1915(a)(3) that an appeal from this decision could not be taken in good faith. Judge David A. Katz.
08/07/2000	8	Judgment Entry: Ordered that this action is dismissed pursuant to 28 USC 1915(e); further the court

		certifies pursuant to 28 USC 1915(a)(3) that an appeal from this decision could not be taken in good faith. Dismissing case. Judge David A. Katz
08/17/2000	9	Notice of Appeal *(FILING FEE NOT PAID)* filed by pro se William Dwight Dotson.
08/14/2002	14	Information copy of order from the USCA for the Sixth Circuit reversing the district court's judgment and remanding the case for further proceedings. the district court erred in holding that Dotson's challenge to his parole eligibility was not cognizable under 42 USC 1983.
09/06/2002	15	True copy of mandate from the USCA for the Sixth Circuit reversing and remanding the decision of the District Court. Mandate issued 9/4/02
12/16/2002	31	Order from the USCA for the Sixth Circuit that the mandate in appeal no 00-4033 (related to docs 9, 11, 12, is recalled. The case is returned to the USCA's active docket.
05/21/2003	32	Information copy of mandate from the USCA for the Sixth Circuit reversing the judgment of the district court which dismissed plaintiff Dotson's civil rights complaint. Certain prisoner claims are cognizable under section 1983. "We (Sixth Circuit) hold that procedural challenges to parole eligibility and parol suitability

determinations such as those made by Dotson (NDOH Case No. 3:00CV7303; Appeal No. 00-4033), and Johnson (NDOH Case No. 4:00CV1075; appeal No. 00-4051) do not "necessarily imply" the invalidity of the prisoner's conviction or sentence and, therefore, may appropriately be brought as civil rights actions, under 41 U.S.C. 1983, rather than pursuant to an application for habeas corpus. To the extent that our prior opinions are in conflict with our reasoning expressed today, they are overruled. For the foregoing reasons, we REVERSE the district court as to Johnson and Dotson."

06/12/2003	34	True copy of mandate from the USCA for the Sixth Circuit reversing the decision of the district court in Appeal No. 00-4033
09/15/2003	40	Letter from the U.S. Supreme Court: Reginald Wilkinson's petition for a writ of certiorari was filed on 8/18/03 and placed on the docket 8/22/03 as U.S. Supreme Court No. 03-287

[The following reproduction includes only selected docket entries.]

GENERAL DOCKET
U. S. Court of Appeals for the Sixth Circuit

No. 00-4033

WILLIAM DWIGHT DOTSON, Plaintiff-Appellant

v.

REGINALD A. WILKINSON, Director, Defendant-Appellee

DOCKET ENTRIES

Date	Docket Text
8/12/02	OPINION filed: REVERSED and remanded, decision for publication pursuant to local rule 206. James L. Ryan, Authoring Judge, Danny J. Boggs, Circuit Judge, R. G. Cole, Circuit Judge (separate concurring opinion).
9/4/02	MANDATE issued with no cost taxed
9/18/02	Upon the determination of the court sua sponte that the appeals in cases 00-3339, 00-4033, and 00-4051 be consolidated and reheard en banc on the common issue of whether an Ohio state prisoner can use 42 U.S.C. § 1983 to seek damages or a new parole hearing on the ground that an earlier hearing was procedurally deficient; IT IS ORDERED that the cases be consolidated for that purpose, and that argument to the en banc court be held on Wednesday, December 11, 2002, at 9:00 A.M. in Cincinnati, Ohio. Boyce F. Martin, Chief Circuit judge; Danny J. Boggs, Alice M. Batchelder, Karen N. Moore, R. G. Cole, Eric L. Clay, Ronald L. Gilman, Julia S. Gibbons, Circuit Judges.
5/19/03	OPINION filed: REVERSED, decision for publication pursuant to local rule 206. Boyce F. Martin, Authoring Judge, Danny J. Boggs, Circuit Judge, Alice M Batchelder, Circuit Judge, Martha C. Daughtrey, Circuit Judge, Karen N. Moore, Circuit Judge, R. G. Cole, Circuit Judge, Eric L. Clay, Circuit Judge, Ronald L. Gilman, Circuit Judge, Julia S. Gibbons, Circuit Judge, John M. Rogers, Circuit Judge. (Judge Gilman delivered a separate opinion concurring in part and dessenting in part, in which Judge Batchelder, Judge Gibbons, and Judge Rogers joined.)
5/19/03	JUDGMENT: REVERSED.
6/10/03	MANDATE ISSUED with no cost taxed [00-4033]. Entered by order of the court.
8/25/03	U. S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellee Reginald A. Wilkinson. Filed in the Supreme Court on 08-18-03, Supreme Ct. case number: 03-287.
4/5/04	U. S. Supreme Court letter filed granting petition for writ of certiorari filed by Reginald A. Wilkinson Supreme Court No. 03-287. Filed in the Supreme Court on 03-22-04.

[The following reproduction includes
only selected docket entries.]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO (YOUNGSTOWN)
CIVIL DOCKET FOR CASE #: 4:00-cv-01075-PCE

Johnson v. Ghee

DOCKET ENTRIES

Filing Date	#	Docket Text
04/26/2000	2	COMPLAINT
04/26/2000	4	MOTION by pla for class certification
07/18/2000	6	MEMORANDUM, OPINION, AND ORDER: Pla filed his action under 42 USC 1983 against Ohio Parole Authority; pla is currently incarcerated in the Ohio State Penitentiary having been denied parole; FURTHER, a prisoner may not raise claims under 42 USC 1983 if a judgment on the merits of those claims would affect the validity of his conviction or sentence unless the conviction or sentence has been set aside; FURTHER, this action is dismissed under 28 USC 1915(e); the ct certifies pursuant to 28 USC

		19159a)(3) that an appeal from this decision could not be taken in good faith.
07/18/2000	7	Judgment: dismissing case pursuant to 28 USC 1915(e); FURTHER, the court certifies pursuant to 28 USC 1915(a)(3) that an appeal from this decision could not be taken in good faith
08/18/2000	9	NOTICE of Appeal by pltf
05/21/2003	16	TRUE cy of order from USCA reversing decision of the District Court [Appeal [9-1] Clerk: Leonard Green; Martin, Chief Judge; Boggs, Batchelder; Daughtrey; Moore; Cole; Clay; Gilman; Gibbons & Rogers, Circuit Judges. dt issd 5/19/03 Cost: -0-

[The following reproduction includes only selected docket entries.]

GENERAL DOCKET
U. S. Court of Appeals for the Sixth Circuit

No. 00-4051

ROGERICO J. JOHNSON, Plaintiff-Appellant

v.

MARGARETTE T. GHEE, Defendant-Appellee

DOCKET ENTRIES

Date	Docket Text
9/18/02	Upon the determination of the court sua sponte that the appeals in cases 00-3339, 00-4033, and 00-4051 be consolidated and reheard en banc on the common issue of whether an Ohio state prisoner can use 42 U.S.C. § 1983 to seek damages or a new parole hearing on the ground that an earlier hearing was procedurally deficient; IT IS ORDERED that the cases be consolidated for that purpose, and that argument to the en banc court be held on Wednesday, December 11, 2002, at 9:00 A.M. in Cincinnati, Ohio. Boyce F. Martin, Chief Circuit Judge; Danny J. Boggs, Alice M. Batchelder, Karen N. Moore, R. G. Cole, Eric L. Clay, Ronald L. Gilman, Julia S. Gibbons, Circuit Judges.
5/19/03	OPINION filed: REVERSED, decision for publication pursuant to local rule 206. Boyce F. Martin, Authoring Judge, Danny J. Boggs, Circuit Judge, Alice M. Batchelder, Circuit Judge, Martha C. Daughtrey, Circuit Judge, Karen N. Moore, Circuit Judge, R. G. Cole, Circuit Judge, Eric L. Clay, Circuit Judge, Ronald L. Gilman, Circuit Judge, Julia S. Gibbons, Circuit Judge, John M. Rogers, Circuit Judge. (Judge Gilman delivered a separate opinion concurring in part and dissenting in part, in which Judge Batchelder, Judge Gibbons and Judge Rogers joined.)
5/19/03	JUDGMENT: REVERSED.
6/10/03	MANDATE ISSUED with no cost taxed

[Reproduced as in original including spelling, etc.]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILLIAM DWIGHT DOTSON,	:	CASE NO. 3:00CV78
PLAINTIFF,	:	1983 CIVIL COMPLAINT
-VS-	:	JUDGE:
REGINALD WILKERSON, DIRECTOR OF DEPARTMENT OF REHAB. & CORRECTION; JOHN KINKELA, CHIEF OF OHIO ADULT PAROLE AUTHORITY; AND MARGARETTE T. GHEE, CHAIRPERSON OF THE OHIO PAROLE BOARD.	:	

* * * * * * * * * * *

Preliminary Statement:

This is a Civil Rights Action brought pursuant to 42 U.S.C. § 1983, asking for prospective Declaratory And Injunctive Relief against state officials of the Department of Rehabilitation And Correction, against state action taken under the color of state law, claiming that the application of Ohio's Revised 1998, Parole Board Guidelines, that were adopted in accordance with Administration Regulation 5120-1-1-10, effective date: March 16, 1998, have the force and effect of law for purposes of an Ex Post Facto violation where the guidelines are applied retrospectively, alters or delays a statutory parole eligibility, increases the quantum of

punishment, and substantially disadvantages the Plaintiff's parole eligibility, in violation of the Due Process Clause of the Fourteenth Amendment, and further in violation of the Ex Post Facto Clause of Article 1 Section 10 of the United States Constitution.

Parties:

1. The Plaintiff, William Dwight Dotson, hereinafter is referred to as Plaintiff, is an inmate at North Central Correctional Institution, P. O. Box 1812, located in Marion, Ohio 43301-1812.

2. Defendant, Reginald Wilkerson, is the Director of the Department of Rehabilitation And Correction, and has been delegated the authority by the Ohio Legislature under O.R.C. § 5120.01 to control all of the various divisions of the department and the duties conferred on the various divisions by law or by order of the director. He is being sued in his official capacity.

3. Defendant, John Kinkela, is the Chief of the Adult Parole Authority, which consist of the chief, a parole supervision section, and a parole board. He was appointed by the director pursuant to O.R.C. § 5149.02, to serve at the pleasure of the director, and to operate under rules adopted by the director as a regular Administrative Unit of the Department. The Legislature specified under O.R.C. § 5149.03, that the duties of the Parole Authority shall be to administer the

provisions of Chapter 2967 et. seq., of the Ohio Revised Code. He is being sued in his official capacity.

4. Margarette T. Ghee, is chairperson of the Ohio Parole Board, and appointed by the director pursuant to his authority under O.R.C. § 5149.02, and shall operate under rules adopted by the director, and administer the provisions of Chapter 2967 et. seq., of the Ohio Revised Code, in accordance with the mandate imposed upon the Parole Authority under O.R.C. § 5149.03. She is being sued in her official capacity.

Facts:

1. The Plaintiff, William Dwight Dotson, was indicted by a Lucas County Grand Jury in case no. CR-81-5324 on the charge of Aggravated Murder, and Aggravated Murder while in the commission of a felony in February of 1981.

2. Following a jury trial on said indictment, the Plaintiff was found guilty of one count of Aggravated Murder and sentenced to serve term of life in prison on July 22, 1981.

3. In accordance with O.R.C. § 2967.13(B) (Former law) the Plaintiff became eligible for parole after serving Fifteen Years, which sentence was imposed for an offense committed prior to October 19, 1981.

4. Administrative Regulation 5120-1-1-07 (A)(2)(3)&(4), effective date: October 15, 1975, governed the procedures to be followed by the parole board when making a

determination to grant or defer release. The regulation, at subsection (A), creates the presumption that an inmate will be released on parole on or about the date of his eligibility, where the regulation mandates that, "unless the parole board, acting pursuant to A.R. 5120-1-1-10, determines that he should not be released on such date for one of the following reasons:

(1) There is substantial reason to believe that the inmate will engage in future criminal conduct, or that the inmate will not conform to such conditions of release as may be established Admin. Regulation 5120-1-1-12.

(2) There is substantial reasons to believe that due to the serious nature of the crime, the release of the inmate into society would create undue risk to public safety, or that due to the serious nature of the crime, the release of the inmate would not further the interest of justice nor be consistent with the welfare and security of society.

(3) There is substantial reasons to believe that due to serious infractions of Administrative Regulations, the release of the inmate would not act as a deterent to the inmate or the other institutionalized inmates from violating institutional rules and regulations.

(4) There is need for additional information upon which to make a release decision." See Exhibit (A) attached hereto.

5. Administrative Regulation 5120-1-1-10 (A)(B), effective date: January 2, 1979, 'Time Of Initial Parole Board Hearing' controls the amount of time that the board may defer any continuance to a second hearing. The regulation states in subsection (B) that, "In any case in which release in denied at the inmate's initial hearing, a second hearing shall be held as determined by the parole board." "In no event shall the hearing be scheduled later than five (5) years beyond the minimum eligibility date for release consideration, unless for good cause shown. If release is denied at such second hearing, the inmate shall be eligible for annual hearings thereafter. See Exhibit (B) hereto attached.

6. On March 1, 1998, the Ohio Parole Board adopted revised parole board guidelines in the form of two-dimensional chart or grid. On the vertical axis there are 13 categories of offense seriousness. The most serious offenses are assigned to category 13, and the least serious offenses are assigned to category 1. On the horizontal axis there are four (4) risk or recidivism categories called the criminal history/risk score. At each intersection of the seriousness and risk recidivism categories there is a guideline range in months to be served before being eligible for parole release, with a mandatory minimum to a discretionary maximum amount of months to be served at each intersection. See Exhibit (D) hereto attached.

7. On March 16, 1998, Director Wilkerson adopted a revised version of A.R. 5120-1-1-10 (emergency) as authorized under O.R.C.

§ 5120.01, and promulgated pursuant to O.R.C. § 111.15. The revised version of the regulation authorizes the parole board, under sections (B)(2), to set the time for subsequent hearings, following the initial hearing, for up to ten (10) years. See Exhibit (C) hereto attached.

8. Chairperson Margarette T. Ghee, states in the Preface to the revised guidelines at paragraph (1) that, "The purpose of the revised guidelines is to assist the parole board in making consistent, fair, and equitable decisions in determining the amount of time an offender must serve before being released. See Exhibit (E) hereto attached.

9. Administrative Regulation 5120-2-10, effective date: May 1, 1988, 'Life Sentences', reads at paragraph (F)(1), that a prisoner serving a sentence of imprisonment for life for an offense of first degree or aggravated murder committed prior to October 10, 1981, becomes eligible for parole consideration after serving fifteen full years. See Exhibit (F) hereto attached.

10. The revised parole board guidelines now calls for any offender convicted of first degree or aggravated murder, at any point in time to serve a must minimum 300 months (25 yrs.), 330 months (27 ½ yrs.), 360 months (30 yrs.), and 390 months (32 ½ yrs.) to the remainder of a persons natural life depending upon where the offender falls in the offense category and criminal history/risk score. In fact, a person serving a life sentence is never eligible for parole release consideration

according to Margarette T. Ghee, where she states at paragraph (4) of the Preface:

> "Life sentences will not be given a projected release date. In those cases the board will hold an open hearing if (emphasis added) the inmate is considered for release. See Exhibit (E) hereto attached.

11. After serving fifteen full years, twelve (12) Months jail time accredited, Plaintiff became eligible for parole and made his initial appearance before the Ohio Parole Board in April of 1995.

12. The Ohio Parole Board pursuant to its authority under A.R. 5120-1-1-07(A)(2), effective date: 10/15/75, found that because of the serious nature of the crime that a second hearing would be deferred or continued for an additional ten (10) years; Thereby, setting his next hearing date for June of 2005.

13. The parole board, complying with A.R. 5120-1-1-10(C), effective date, 1/2/79, held a review hearing in accordance with A.R. 5120-1-1-20, half of the Plaintiff's ten (10) year

continuance to determine if Plaintiff could now be considered eligible for release. The review hearing was held on March 10, 2000.

14. The review panel utilizing the parole boards "Revised Guidelines' of March 1, 1998, denied the Plaintiff any review eligibility. Stating that, "Inmates continuance date remains short of the guideline range." See Exhibit (G) hereto attached.

15. The review panel placed Plaintiff in category 13 with a risk score of 8, which calls for a mandatory must serve minimum of 390 months (32 ½ yrs.) before Plaintiff is eligible for parole consideration of any release. See Exhibit (G) at section A.

16. The review panel set Plaintiff's next hearing date for June of 2005, the original date of his initial ten (10) year continuance, and emphasized that Plaintiff would still remain short of his guideline range by at least 7 ½ years. See, Exhibit (G) at section D.

Claims For Relief:

1. The revised parole guidelines, effective March 1, 1998, and adopted by the director under AR 5120-1-1-10 (emergency), effective March 16, 1998, are being applied retrospectively to the plaintiff who committed his crimes in February 1981, and because the revised guidelines alter the legal consequences of his crimes by requiring a must serve minimum of 390 months (32 ½ yrs), before and if he will be considered eligible for parole, where the legal consequences for his acts called for a statutory maximum of fifteen

(15) full years before becoming eligible for parole under O.R.C. § 2967.13(B), for persons sentenced to life in prison for aggravated murder committed prior to October 19, 1981. The plaintiff claims that the defendant's are in violation of the Ex Post Facto clause of Article I, section 10 of the United States Constitution, and the due process clause of the Fourteenth Amendment.

2. The revised parole guidelines substantially disadvantages the plaintiff where the guidelines eliminate any opportunity for parole eligibility as mandated by O.R.C. § 2967.13(B), which states that, "A prisoner serving a sentence of imprisonment for life for the offense of first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, becomes eligible for parole after serving a term of fifteen full years." Plaintiff again claims that the defendant's are in violation of the Ex Post Facto clause of Article I, section 10 of the United Stated Constitution, and the due process clause of the Fourteenth Amendment.

3. The revised parole guidelines substantially disadvantages the plaintiff because of the increase in the 'quantum of punishment' above that of the statutory mandate and the administrative rules in effect at the time plaintiff committed his crimes. The guidelines alter the 'presumptive sentencing range' by requiring a must serve minimum of 390 months (32 ½ yrs.) before becoming eligible for parole consideration, if then, in contradiction to O.R.C. § 2967.13(B) (former law), and AR 51202-10(F), which mandates

that persons serving life sentences for first degree or aggravated murder committed prior to October 19, 1981, becomes eligible for parole after serving fifteen full years. A violation of the Ex Post Facto clause of Article 1, Section 10 of the United States Constitution and the due process clause of the fourteenth amendment.

4. The revised parole guidelines work to the substantial disadvantage of the plaintiff where they alter and cancel the period between parole reconsideration hearings where the administrative rule 5120-1-1-10(A)(B), effective date: January 2, 1979, the rule governing the procedures to be followed by the parole board when plaintiff committed his crimes, mandated a second hearing no later than five (5) years from the initial hearing, with annual hearings thereafter if denied at the second hearing, and where revised A.R. 5120-1-1-10(B)(2), effective date: March 16, 1998, which adopts the revised parole guidelines by authorizing initial hearing continuances for up to ten (10) years with no chance of any second reconsideration hearing prior to the expiration of that time, violates both the due process clause of the fourteenth amendment, and article 1, section 10 of the Ex Post Facto clause of the United States Constitution.

Prospective Declaratory & Injunctive Relief:

1. That the court issue a binding statement declaring and explaining Plaintiff's due process rights under O.R.C. § 2967.13(G) (former law), and Administrative Regulations 5120-1-1-07, effective date: 10/15/75, and 5120-1-1-10, effective date: 1/2/79; Also, A.R. 5120-2-10(F), effective date: 5/1/88.

2. That the Court issue a binding statement declaring and explaining all parties legal rights, duties, powers, limitation of powers, privileges, liabilities, and disabilities under the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution.

3. That the Court issue a permanent injunction ordering the Defendants to comply with the court's declarations regarding Plaintiff's due process rights under the Fourteenth Amendment, and to proceed toward a prompt and immediate parole hearing in accordance with the statutory laws and administrative rules in place when Plaintiff committed his crimes.

Signed this _____ day of _____, 2000.

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,
/s/William Dwight Dotson
Inst. No. A-163-897
North Central Correctional Inst.
P. O. Box 1812
Marion, Ohio 43301-1812

5-8-2000

Exhibit A

5120:1-1-07 [1975] Procedure for release on parole, furlough, and shock parole

(A) An inmate may be released on or about the date of his eligibility for release, unless the Parole Board, acting pursuant to Administrative Regulation 5120:1-1-10, determines that he should not be released on such date for one or more of the following reasons:

(1) There is substantial reason to believe that the inmate will engage in further criminal conduct, or that the inmate will not conform to such conditions of release as may be established under Administrative Regulation 5120:1-1-12;

(2) There is substantial reason to believe that due to the serious nature of the crime, the release of the inmate into society would create undue risk to public safety, or that due to the serious nature of the crime, the release of the inmate would not further the interest of justice nor be consistent with the welfare and security of society;

(3) There is substantial reason to believe that due to serious infractions of Administrative Regulations, the release of the inmate would not act as a deterrent to the inmate or to other institutionalized inmates from violating institutional rules and regulations;

(4) There is need for additional information upon which to make a release decision.

(B) Administrative Regulation 911, filed on September 23, 1975, is hereby rescinded.

* * *

5120:1-1-08 [1981] Factors that may be considered in a release hearing

In making any determination under rule 5120:1-1-07 of the Administrative Code, the parole board may take into consideration any of the following factors:

(A) The inmate's ability and readiness to assume obligations and undertake responsibilities, as well as the inmate's own goals and needs;

(B) the inmate's family status, including whether his relatives display an interest in him or whether he has other close and constructive association in the community;

(C) the type of residence, neighborhood, or community in which the inmate plans to live;

(D) The inmate's employment history and his occupational skills;

(E) The inmate's vocational, educational, and other training;

(F) The adequacy of the inmate's plan or prospects on release;

(G) Any recommendations made by the sentencing courts;

(H) The inmate's conduct during his term of imprisonment;

(I) The inmate's behavior and attitude during any previous experience of probation, furlough, parole, or other administrative release and the recency of such experience;

(J) The availability of community resources to assist the inmate;

(K) The nature of the offense for which the inmate was convicted;

(L) The inmate's pattern of criminal or delinquent behavior prior to the current term of imprisonment;

(M) The physical and mental health of the inmate as they reflect upon the inmate's ability to perform his plan of release;

(N) The presence of outstanding detainers against the inmate;

(O) Any recommendations made by the staff of the department of rehabilitation and correction or any of its agencies;

(P) Any other factors which the board determines to be relevant, except for documents related to the filing of a grievance under rule 5120-9-31 of the Administrative Code.

* * *

5120:1-1-09 [1981] Factors that shall be considered in release hearing

In considering the factors specified in rule 5120:1-1-08 of the Administrative Code, the parole board shall consider the following:

(A) Any reports prepared by any institutional staff member relating to the inmate's personality, social history, and adjustment to institutional programs and assignments;

(B) any official report of the inmate's prior criminal record, including a report or record of earlier probation or parole;

(C) Any presentence or postsentence report;

(D) Any recommendations regarding the inmate's release made at the time of sentencing or at any time thereafter by the sentencing judge, presiding judge, prosecuting attorney, or defense counsel;

(E) Any reports of physical, mental, or psychiatric examination of the inmate;

(F) Such other relevant written information concerning the inmate as may be reasonably available, except that no document related to the filing of a grievance under rule 5120-9-31 of the Administrative Code shall be considered;

(G) Written or oral statements by the inmate, other than grievances filed under rule 5120-9-31 of the Administrative Code.

* * *

Exhibit B

5120:1-1-10 Time of initial parole board hearing

(A) The initial hearing for all inmates serving indeterminate sentences shall be held on or about the date when they first become eligible for release under the Administrative Code.

(B) In any case in which release is denied at the inmate's initial hearing, a second hearing shall be held as determined by the parole board, unless waived by the parole board, pursuant to rule 5120:1-1-11 of the Administrative Code. If a continuance of twelve months or less is ordered, the parole board shall consider granting a furlough as provided by rule 5120:1-1-23 of the Administrative Code for the period of such continuance. The minutes of the hearing shall reflect that both parole and furlough were considered by the parole board. The reasons for such extended time shall be communicated in writing to the inmate and to the managing officer. In no event shall the second hearing be scheduled later than five years beyond the minimum eligibility date for release consideration, *unless for good cause shown*. If release is denied at such second hearing, the inmate shall be eligible for annual hearings thereafter.

(C) Inmates denied release shall have their status reviewed in accordance with rule 5120:1-1-20 of the Administrative Code.

(emphasis added)

* * *

Exhibit C

DEPARTMENT OF REHABILITATION AND CORRECTION

5120:1-1-10 Initial and continued parole board hearing dates; projected release dates.

(A) The initial hearing for each prisoner serving an indeterminate sentence shall be held on or about the date when the prisoner first becomes eligible for parole pursuant to rule 5120:1-1-03 of the Administrative Code.

(B) In any case in which parole is denied at a prisoner's regularly constituted parole hearing and the board does not continue the prisoner to the expiration of the maximum sentence, the parole board shall:

~~(1) Set the time for a continued hearing, which shall not be more than five years after the date of the hearing, unless the parole board determines sufficient cause has been demonstrated to set a date in excess of five years, or~~

~~(2) Set a projected release date in accordance with paragraph (F) of this rule.~~

(1) SET A PROJECTED RELEASE DATE IN ACCORDANCE WITH PARAGRAPH (D) OF THIS RULE, OR

(2) SET THE TIME FOR A SUBSEQUENT HEARING, WHICH SHALL NOT BE MORE THAN TEN YEARS AFTER THE DATE OF THE HEARING.

~~(C) In the event a continued hearing date of six months or less is established in accordance with paragraph (B)(1) of this rule, the parole board may consider granting a furlough pursuant to rule 5120:1-1-23 of the Administrative Code.~~

~~(D)~~ (C) In any case where parole is denied the reasons for such denial shall be communicated to the prisoner and the warden in writing.

~~(E) The status of prisoner denied release shall be reviewed in accordance with rule 5120:1-1-20 of the Administrative Code.~~

~~(F)~~ (D) The parole board at any parole release consideration hearing may, in its discretion, establish a projected release date ~~one year~~ TEN YEARS or less in the future which, unless rescinded pursuant to this rule, would permit the prisoner to be released without a further appearance before the parole board or a hearing panel. This date shall be subject to rescission within the discretion of the parole board and shall not create any expectation of release or entitlement to be released thereon.

~~(G)~~ (E) A projected release date shall not be established for any prisoner serving a life sentence, sentence of fifteen years to life, or a sentence imposed for any offense pursuant to Chapter 2907. of the Revised Code.

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Exhibit D

PART A: PAROLE GUIDELINES CHART

To promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the Ohio Parole Board has developed the following parole decision guidelines.

The Parole Guidelines Chart, shown below, sets forth the applicable guideline range (in total months to be served before release, including jail time) based on the seriousness of the offender's current offense and the offender's criminal history/risk score. The applicable guideline range presumes good institutional conduct, fulfillment of any spceial conditions imposed by the Parole Board, and the development of a suitable release plan. The Parole Board may depart from the guidelines (either upward or downward) for good cause upon the provision of specific written reasons.

The applicable guideline range does not supersede any minimum or maximum sentence applicable to the offender.

PAROLE GUIDELINES CHART
(Applicable Guideline Range in Months to be Served Before Release by Offense Category and Criminal History/Risk Score)

OFFENSE CATEGORY	CRIMINAL HISTORY/ RISK SCORE [0 or 1]	[2, 3, or 4]	[5 or 6]	[7 or 8]
1	0-6	4-10	8-14	12-18
2	6-12	10-16	14-20	20-28
3	12-18	18-24	24-32	32-40
4	18-24	24-32	32-44	44-56
5	24-36	36-48	48-60	60-80
6	36-48	48-60	60-84	84-108

OFFENSE CATEGORY	CRIMINAL HISTORY/ RISK SCORE [0 or 1]	[2, 3, or 4]	[5 or 6]	[7 or 8]
7	48-60	60-84	84-108	108-132
8	60-84	84-108	108-132	132-156
9	84-120	108-144	132-168	156-192
10	120-180	150-210	180-240	210-270
11	180-240	210-270	240-300	270-330
12	240-300	270-330	300-360	330-390
13	300-life	330-life	360-life	390-life

Exhibit E

Preface

The purpose of the revised parole guidelines is to assist the Parole Board in making consistent, fair, and equitable decisions in determining the amount of time an offender must serve before being released to the community, without removing the opportunity for individual case consideration. The guidelines are based on the seriousness of the offender's offense and the offender's risk of recidivism, and provide for the consideration of the offender's institutional conduct.

The revised parole guidelines are in the form of a two-dimensional chart or grid. On the vertical axis, there are 13 categories of offense seriousness. The most serious offenses are assigned to Category 13; the least serious offenses are assigned to Category 1. On the horizontal axis, there are four risk of recidivism categories, based on an empirically developed score called the criminal history/risk score. At each intersection of the seriousness and risk of recidivism categories, there is a guideline range (in months to be served before release). Because there are 13 offense categories and four risks of recidivism categories, the grid has 52 guideline ranges. The guideline ranges are designed for the typical or average cases and presume good institutional behavior. The use of a guideline "range" rather than a "point" is to allow the Parole Board some discretion to address individual case factors without departing from the guidelines.

The guidelines will also allow the Board to inform most inmates of their projected release date the first time they see the Board. These dates may be established up to ten years from the date of the hearing, and will be contingent upon good institutional behavior as well as on the prisoner's participation in rehabilitative programming.

For those offfenders who will be required to serve more than ten years additional time the Board will schedule a 10-year reconsideration hearing. Prisoners serving time for sex offenses or life sentences will not be given a projected release date. In those cases the Board will hold an "open" hearing if the inmate is considered for release.

The revision of the Parole Board guidelines is part of an ongoing quality improvement process. The guidelines will continue to be a work in progress and the Parole Board will remain flexible in making adjustments in order to continuously make improvements.

/s/Margarette T. Ghee
Chairperson

Exhibit F

DEPARTMENT OF REHABILITATION AND CORRECTION

5120-2-10 LIFE SENTENCES.

(A) As a result of a number of amendments to the Revised Code over a period of years, the provisions for diminution of sentence and eligibility for parole, shock parole, employment/education furlough and home furlough are affected by the language in the sentencing documents (journal entries) concerning the crime and the sentence imposed as well as the date on which the crime was committed. The purpose of this rule is to explain diminution of sentence and eligibility for release for persons serving life sentences as established by the Revised Code. This rule does not expand release eligibility established by any other rule of the Administrative Code.

(B) A sentence of life imprisonment imposed pursuant to section 2929.03 of the Revised Code for the offense of aggravated murder shall be presumed to be a sentence of life imprisonment with parole eligibility after twenty years, subject to diminution under rules 5120-2-05, 5120-2-06, 5120-2-07 and 5120-2-08 of the Administrative Code, unless the journal entry of the court specifies that parole eligibility is to be after twenty full years or thirty full years.

(C) A prisoner serving a sentence of imprisonment for life with parole eligibility after serving thirty full years of imprisonment for the offense of aggravated murder with one or more of the specifications enumerated in section 2929.04 of the Revised Code.

(1) Becomes eligible for parole consideration after serving thirty full years:

(a) The thirty full years are reduced by jail-time credit pursuant to rule 5120-2-04 of the Administrative Code.

(b) The thirty full years are not diminished by time off for good behavior pursuant to rule 5120-2-05 of the Administrative Code.

(c) The thirty full years may not be reduced by days of credit earned pursuant to rules 5120-2-06, 5120-2-07, and 5120-2-08 of the Administrative Code.

(2) Is not eligible for shock parole.

(3) Is not eligible for release on furlough for employment

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pursuant to rule 5120-2-04 of the Administrative Code.

(b) The twenty years are diminished by time off for good behavior pursuant to rule 5120-2-05 of the Administrative Code.

(c) The twenty years may be reduced by credit earned pursuant to rules 5120-2-06, 5120-2-07, and 5120-2-08 of the Administrative Code.

(2) Is not eligible for shock parole.

(3) Is not eligible for release on furlough for employment or education pursuant to rule 5120:1-1-23 of the Administrative Code.

(4) Is not eligible for release on furlough for trustworthy prisoners pursuant to rule 5120-9-35 of the Administrative Code except for the purpose of visiting a dying relative or attending the funeral of a relative.

(F) A prisoner serving a sentence of imprisonment for life for an offense of first degree murder or aggravated murder committed prior to October 19, 1981.

(1) Becomes eligible for parole consideration after serving fifteen full years:

(a) The fifteen years are reduced by jail-time credit pursuant to rule 5120-2-04 of the Administrative Code.

(b) The fifteen years are not diminished by the time off for good behavior pursuant to rule 5120-2-05 of the Administrative Code.

(c) The fifteen years may not be reduced by days of credit earned pursuant to rules 5120-2-06, 5120-2-07, and 5120-2-08 of the Administrative Code.

(2) Is not eligible for shock parole.

(3) Is eligible for release on furlough for employment or education pursuant to rule 5120:1-1-23 of the Administrative Code.

(4) Is eligible for release on furlough for trustworthy prisoners (home furlough) pursuant to rule 5120-9-35 of the Administrative Code.

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committed on or after July 1, 1983 or if serving a term of actual incarceration imposed pursuant to section 2907.10 of the Revised Code for an offense committed before July 1, 1983.

(3) Is not eligible for release on furlough for employment or education pursuant to rule 5120:1-1-23 of the Administrative Code if the offense was committed on or after October 19, 1981.

(4) Is not eligible for release on furlough for trustworthy prisoners (home furlough) pursuant to rule 5120-9-35 of the Administrative Code except for the purpose of visiting a dying relative or to attend the funeral of a relative if the offense was committed on or after October 19, 1981.

(I) A prisoner serving a sentence of imprisonment for life for an offense other than first degree murder or aggravated murder committed prior to October 19, 1981.

(1) Becomes eligible for parole consideration after serving ten full years:

(a) The ten full years are reduced by jail-time credit pursuant to rule 5120-2-04 of the Administrative Code.

(b) The ten full years is not diminished by time off for good behavior pursuant to rule 5120-2-05 of the Administrative Code.

(c) The ten full years may not be reduced by days of credit earned pursuant to rules 5120-2-06, 5120-2-07, and 5120-2-08 of the Administrative Code.

(2) Is eligible for shock parole.

(3) Is eligible for release on furlough for employment or education pursuant to rule 5120:1-1-23 of the Administrative Code.

(4) Is eligible for release on furlough for trustworthy prisoners (home furlough) pursuant to rule 5120-9-35 of the Administrative Code.

(J) A prisoner serving a sentence of imprisonment for life consecutive to any other term or terms of imprisonment becomes eligible for parole consideration as follows:

(1) Where the life sentence is imposed for aggravated murder, with one of the specifications enumerated in section 2929.04 of the Revised Code, committed on or

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Effective Date 5/01/88
Replaces None
Promulgated under 111.15
Statutory Authority 5120.01
Expires Indefinite
Prior Effective Date 11/30/87
(Emergency), 2/26/88 Emergency)

CERTIFIED:
SIGNATURE: /s/Richard P. Seiter
DATE: April 13, 1988

Exhibit G

DIVISION OF PAROLE AND COMMUNITY SERVICES
REVIEW SCREENING RECOMMENDATION SHEET

TO: Chair, Parole Board
FROM: David W. Dogie
RE: (Name): William Dotson Inst. NCCI 163-897
DATE: 3-10-2000

On the above date, a REVIEW SCREENING was held concerning the above inmate. Notice of that screening was sent to the inmate at least seven (7) days prior on 2-22-2000 (Month/Day/Year).

Based on this screening of the inmate's Central Office file, Institution files and Unit file and any written information that was properly submitted by the inmate, the following is the recommendation.

A. (√) Category 13 Section 201a Risk 8 Range 390-life Time Served: 230 at cont. date: 293

B. ( ) Recommend a Parole Board Hearing on or about:
1. Reasons:

C. ( ) Reschedule for (Month/Year) obtain additional information, to wit
or for the following reason:

D. (√) Denied for the following reason(s): Inmate's continuance date remains short of the Guideline Range.
1. ( ) Serious Rule Infractions
2. ( ) Confined in LC or AC
3. (√) Guideline Range

E. (√) Next hearing date will be: 6/2005 (Month/Year)

/s/David Dogie
Hearing Officer

In the event of an unfavorable recommendation, submit your written objection to the Parole Board within three (3) days of receipt of the notice. (See reverse side of this form)

[Reproduced as in original including spelling, etc.]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILLIAM DWIGHT DOTSON,	:	CASE NO. 3:00CV7303
PLAINTIFF,	:	Katz
-VS-	:	1983 CIVIL COMPLAINT
REGINALD WILKERSON, DIRECTOR OF REHAB. &	:	FRCP-15
CORRECTION; JOHN KINKELA, CHIEF OF OHIO	:	MOTION TO AMEND PAGE (6) DUE TO
ADULT PAROLE AUTHORITY; AND	:	COPYING MISTAKE
MARGARETTE T. GHEE, CHAIRPERSON OF THE OHIO	:	
PAROLE BOARD.	:	
DEFENDANTS.	:	

5120-2-10

After October 19, 1981, the prisoner shall be eligible for parole after serving the sum, without diminution, of any three-year terms of actual incarceration imposed pursuant to section 2929.71 of the Revised Code for using a firearm in the commission of an offense, plus the twenty or thirty full years, without diminution, as designated by the court for parole eligibility, plus the time required for parole eligibility for any other crimes. There shall be no limit to the length of such aggregated sentence.

(2) Where the life sentence is imposed for aggravated murder without one or more specifications enumerated in Section 2929.04 of the Revised Code, committed on or after October 19, 1981, the prisoner shhall be eligible for parole after serving the sum, without diminution, of any three-year terms of actual incarceration imposed pursuant to section 2929.71 of the Revised Code for using a firearm in the commission of an offense, plus the sum of twenty years for each such consecutive life sentence and the sum of all other consecutive minimum sentences, each diminished, as provided in Rules 5120-2-05, 5120-2-06, 5120-2-07, and 5120-2-08 of the Administrative Code. There shall be no limit to the length of such aggregated minimum term.

(3) Where the life sentence is imposed for first degree murder or aggravated murder committed prior to October 19, 1981, and does not include a life sentence imposed for aggravated murder committed on or after October 19, 1981, the prisoner shall be eligible for parole after serving the sum, without diminution, of any terms of actual incarceration imposed pursuant to Section 2929.71 of the Revised Code for using a firearm in the commission of an offense, plus fifteen full years, without diminution, plus the required time for parole eligibility for any other crimes. However, this aggregate shall not exceed the sum of all terms of actual incarceration time plus twenty full years.

CERTIFICATE OF SERVICE

This document is to certify that a true and exact copy of the foregoing motion with attached FRCP-15 was mailed to Office of the Clerk, United States District Court by regular U.S. Mail this 19 day of July, 2000, via the mail drop-box within the confines of the Allen Correctional Institution, in accordance with *State v. Williamson*, 10 Ohio St.2d 195 as referenced through O.R.C. Sections 2505.04, 2305.17, and all applicable Ohio Rules of Civil Procedures and Ohio Rules of Appellate Procedure.

/s/William Dotson

I declare under penalty of perjury that the foregoing is true and correct to the best of my belief and knowledge.

/s/William Dotson

7-20-2000
Date Executed

[Reproduced as in original including spelling, etc.]

The United States District Court
Northern District of Ohio

Rogerico Johnson & ~~Derrick Matthews~~ Pro se Plaintiffs,	Civil Case #4:00CV1075 Judge Economus Mag. Judge Limbert
vs.	
Margaret T. Ghee Defendant	Civil Complaint 42 U.S.C. 1983

This is a civil rights action filed by Rogerico J. Johnson and Derrick Matthews, Pro se, state prisoners, for declaratory and injunctive relief under 42 U.S.C. 1983, alleging denial of a full and fair parole review in violation of the due process clause of the Fourteenth Amendment to the U.S. Constitution. *Williams v. Ward*, 556 f2d.1143; 434 U.S. 944 (1977)

Jurisdiction

This court supplemental jurisdiction over plaintiff's claims of violation of federal constitutional rights under 28 U.S.C. 1367.

I. *Previous Lawsuits*: Plaintiffs have not been involved in any other lawsuit, except this present one.

II. *Place of Present Confinement*: Ohio State Penitentiary

A. There is no prisoner grievance procedure available in Ohio to challenge the Ohio Adult Parole Authorities.

B. There is no appeal system available in Ohio to challenge the Ohio Adult Parole Authority.

C. However, plaintiffs have written several letters complaining to the defendant about said violations, but to no avail. Defendant neglects to even acknowledge such complaints.

III. *Parties*:

A: Plaintiffs:

1) Rogerico J. Johnson
Ohio State Penitentiary
878 Coitsville-Hubbard Rd.
Youngstown, Ohio 44504

2) Derrick Matthews
Ohio State Penitentiary
878 Coitsville-Hubbard
Youngstown, Ohio 44504

B: Defendants: Margaret T. Ghee
Ohio Adult Parole Authority
1050 Freeway Dr., North
Columbus, Ohio 43229

V. *Statement of Claims*:

1. The assembly of the Parole Boards, reviewing panel was/is constructed contrary to the DAR 5120:1-1-11(C)
2. The most basic due process right is the right to be heard and the right to hear; to be informed of the evidence against you, so that you can respond to it.
3. The right to parole review cannot be arbitrarily vitiated without depriving prisoners of a liberty interest in violation of due process.
4. Ohio Parole Authorities neglects to follow the explicit criteria set forth in its own Parole Board Guidelines.
5. Some of Ohio Parole procedures are direct violations of the Ex Post Facto laws.

VI. *Memorandum of Facts*

- *Support case*

The Due Process Clause of the Fourteenth Amendment, which imposes the same restraints on the state that the corresponding clause of the Fifth Amendment imposes on the national government, prohibits any state from depriving any person of life, liberty or property, without due process of law. No right to due process arises, under this language, except where a state undertakes to deprive a person of one or more of the three interests specified: life, liberty or property. It is "liberty" of course, which we're concerned in the case at bar.

Although incarceration itself represents a quintessential deprivation of liberty, lawful incarceration does not extinguish all of prisoner's constitutional protected liberty. Prisoners retain what the Supreme Court has characterized as "a residuum of liberty."

It is well established that the prisoners in the state of Ohio do not have a right to a parole.
However, the State of Ohio has created a right to parole review. Ohio Rev. Code 2967.13 & .19; Ohio Administrative Rules 5120:1-1-03, 1-1-07, 1-1-10 & 1-1-11. The right to parole review cannot be arbitrarily vitiated without depriving prisoners of a liberty interest in violation of due process—these claims are cognizable under 1983.

1. The assembly of the Parole Board Reviewing Panel was/is constructed contrary to the DAR 5120:1-1-11(C).

Plaintiffs interpret and understand DAR 5120:1-1-11(C) to mean that it must be at least (#2) two people present at each and every Parole Board hearing; (1 Parole Board member and 1 Parole Board hearing officer). Representing the Parole Board before a

decision can be impartial and a hearing can be full and rendered fair.
Plaitiff Derrick Matthews went to his Parole Review hearing on August 7th 1998, and he was only confronted by one Parole Board representative (Ms. Jones) which is explicitly contrary to the Admin. Rule 5120:1-1-11(C). Any decision resulting from this hearing—when the meeting (hearing) is contrary to the rule, could never be an impartial decision nor can this hearing be considered heard by a full panel (#2 representatives), when only one representative heard Plaintiff's case. Also, Plaintiff Matthews wasn't made aware of the Parole Boards decision until June of 1999, but the fraudulent review hearing was conducted ten months earlier—this procedure is also contrary to the rules, so ultimately any decisions resulting from these illegal procedures can never be deemed fair!!!
Plaintiff Rogerico J. Johnson went to his parole review hearing on April 9th 1999 and he was only confronted by one Parole Board representative (Ms. Jones). There are several other prisoners at O.S.P. who have only witnessed one Parole Board representative at their hearing. We have affidavits from other prisoners to substantiate this fact.

Violating the Admin. Rule 5120:1-1-11(C), is common practice by Ohio Parole Authorities at O.S.P. One Parole Board representative cannot determine the fate of a prisoner by themselves without increasing the risk of errors. The rules that govern the Parole Board exist for a reason. If these reasons are ignored, then they may not as well exist.

These rules exist to protect our rights; these review hearings are suppose to be structured to assure that the findings at a review hearing be based on verified facts and that the exercise of discretion be informed by an accurate knowledge of the truth. Plaintiffs and other

prisoners who have only been seen by one Parole Board representative received the maximum amount of time one can receive at only one hearing—(#10 yrs) ten year. And if each prisoner's record is thoroughly investigated and the Parole Board Guidelines are applied appropriately, Ohio Parole Authorities can't justify giving Plaintiffs and other prisoners ten years. *Our parole papers have been fraudulently doctored by the one Parole Board representative we each saw.*

2. *The most basic due process right is the right to be heard, prisoners also have the right to hear, i.e. to be informed of the evidence against them, so they can respond to it.*

Plaintiffs were not allowed to participate, interact or stress their opinions at their own parole review hearings. The Parole Board representative looked through "our" files out of our presence, but in our distance of eye sight. We were not asked any questions, nor were we given an opportunity to ask any questions. Majority of the prisoners who were given the maximum amount of flop time, receive their parole board decisions via U.S. mail.

Denying plaintiffs an opportunity to speak in on their own behalf eliminates any opportunity for "us" to correct any possible or obvious errors. Plaintiffs can demonstrate that this form of procedure do and did prejudice the outcome of these review hearings.

Both plaintiffs who received their Parole Board decisions in the mail immediately noticed several mistakes and errors including offenses they had not been convicted of, offenses that did not even exist in their criminal or prison conduct files and a blatant disregard to follow the P.B. guidelines in calculating time for each offense or behavior(s). This

indiscretion or mishap could of easily been eliminated if the plaintiffs (and all prisoners) is/would have been adequately informed of the basis for denying their parole. At that point they could have corrected apparent factual errors and challenged the Parole Authority's decision(s).

If prisoners have a constitutionally based liberty interest, that does not mean that prison officials can never take it away. It means that they cannot do so arbitrarily and that they must provide fair procedures that will prevent arbtrariness!

Due process can only be satisfied when the candidate for parole is allowed to participate meaningfully in the proceeding by presenting information relevant under the criteria used by the P.B. authorities.

DAC 5120:1-1-07 states in part: whenever feasible, persons directly affected by the decision making process shall be given notice and an opportunity to be heard prior to the decision becoming final. Fairness and equity shall be the standards by which prisoners, releases, staff and the public are treated. DAC 5120:1-1-07(G).

If plaintiffs' Parole Board Decision Papers were submitted as evidence to support this claim, the court will notice that there does not exist a space or an area on these papers to accommodate the prisoners' remarks, opinions or rebuttals—there isn't even a place designated for the prisoner to subscribe his signature to substantiate that he was even persent at the decision-making review hearing. The reason being is that here at O.S.P. the prisoner is silenced at their review hearings and ignored if they say something regardless of being told that their comments isn't necessary, because their institutional file will do the speaking for them!

So, if is as if the prisoner is not at his own parole review hearing, because he's not allowed to defend himself. This is an explicit violation of the Due Process Clause!

3. *The right to parole review cannot be arbitrarily vitiated without depriving prisoners of a liberty interest in violation of due process.*

- In the Monroe vs. Thigpen case, 937 F2d 1437 (1991), a parole may not be denied based on false information even if not liberty interest exists.
- And in the Greenholtz case, 442 U.S. 13 (1979), that inaccurate information in parole files increases the risk of erroneous parole decisions.

The Parole Authorities use of the OPB Guideline system to grade me, Plaintiff Johnson, for offenses (crimes) prison misconduct—that I've never been found guilty of or even charged for. I was graded for two aggravated arson offenses, was given 108 months for each agg. arson offense, together they total 216 months of flop time, which equals an exact total of #18 years. The ironic part of this whole incident is there's nothing in my file to substantiate that "I" was ever charged, accused, let alone convicted of an aggravated arson in my entire life. However, in 1992 on two different occasions, I received two institutional conduct reports for offenses of arson. There are distinct differences between arson and aggravated arson—the nature of the offenses and the penalty for the offenses differ.

But the obvious doesn't stop there. I was only convicted of one of the arson offenses by the institutional Rule Infraction Board. The other arson offense was dismissed (actually the ticket was torn up). There's no disposition for the 4-8-92 arson,

because it was dismissed—but the ticket and disposition for the 4-15-92 arson substantiate that I was indeed convicted of an arson—at the top of the ticket/conduct report it charges me with arson 2909-03. It is not an honest mistake for the plaintiff to be graded and given time for offenses he's never even been charged or accused of.

According to the OPB Guideline Diversionary Dispositions:

(a) Criminal conduct resulting in diversion from the Judicial Process without a finding of guilt *is not to be counted* in scoring this item. So technically, the parole board's own guideline state that if a prisoner isn't found guilty of a particular charge, then don't grade him on it.

The maximum penalty for an arson charge that I could have received if the guideline applied appropriately is #20 months—this is quite far and different from what I received for aggravated arson--#108 months. It is evident that this error or miscarriage of justice did prejudice the outcome of the proceedings. There are more errors involving both plaintiffs, of this sort, but it would take more paper and space and I'm trying to be as brief as possible.

The Parole Board Guidelines are rules or instructions designed to direct the Parole Authorities, so that they don't abuse their discretion. Guidelines are principles set up by an authority to help govern a body in which manner its business shall be conducted.

Basically, the Ohio Parole Authorities have created a substantive criteria—by creating the P.B. Guidelines, and due process requires that the decisions actually be made based on those criteria.

Plaintiff received a multitude of flop time based on false information. The Parole Authorities retain extensive discretion in determining the appropriateness of parole for each particular prisoner, nevertheless, a parole board is not at liberty to deny artitrarily and capriciously parole authorized by the state statute. While parole statutes conferred no liberty interest in parole, it did not grant Parole Board discretion to rely upon false information in determining whether to grant parole.

Both Plaintiffs argue that although "we" have no liberty interest in parole, we have a due process right to be fairly considered for parole. Plaintiffs contend that the defendants reliance on false information in order to deny them parole violates due process.

4. *Ohio Parole Authorities neglect to follow the explicit criteria set forth in its own Parole Board Guidelines.*

- Guidelines page #62—multiple separate offenses states: "this chart is to be used in the following manner:

First, determine the points for each of the multiple separate offenses from this chart. *Second*, add these points together to obtain a total score. *Third*, consult the chart again to determine whether the total score places the offense behavior in a higher category."

Now please follow me: Plaintiff Matthews has four separate offenses--#3 assault charges and #1 aggravated robbery charge.

Assault offenses are category two = 1/3 points
Aggravated robbery offenses are category nine = 216 points

Assaults:	Aggravated Robbery:	total:	would remain
1/3+1/3+1/3=1 pt	+216 pts	=217	=category nine

The next category is a category ten which equals 432 points. Being that Plaintiff Matthew points did not sufficiently change, the rules/guidelines say that when the points don't suficiently change, the category remains the same.

Well, instead of adding the points like the guideline instructs the defendant to do, the defendant adds the categories together: category two + category nine to equal a category eleven.

Being that the category helps determine the amount of flop time a prisoner receives, disregarding the Guideline instructions and adding the categories together to create a greater category, in turn, creating a greater penalty (flop time). This is a blatant disregard for the rules and procedure based on fraud, to enhance the Plaintiffs flop time—this is in itself a criminal act; a Parole Board may not engage in flagrant or unauthorized action and consider it legal or fair

5) *Parole statutes that change the standards for granting parole or dictate longer periods of incarceration, if applied "retroactively" to offenses committed before the change in law, violates the ex post facto law.*

(A) The history of the Ohio Adult Parole Authority is well documented and should be used to help differentiate the grave difference between flop time and granting parole prior to the passing of Senate Bill #2, compared to the outrageous amount of time the Parole Authorities now extend.

Both Plaintiffs were convicted on aggravated robbery charges prior to the existing "truth-in-sentencing" law. And prior to the new law coming into effect,

prisoners with the same exact offenses (crimes) on their records, similar institutional records and exact same sentences were only receiving a maximum of five (5yrs.) years flop time.

This "truth-in-sentencing" law is being applied retroactively to offenses that were committed almost nine years before Senate Bill #2 was even thought of, and this procedure violates the ex post facto clause.

(B) Both plaintiffs have been convicted of simple assault offenses during their prison incarceration or while under the custody of the Department of Rehabilitation and Corrections. These offenses were committed prior to the enactment of Senate Bill #2 (truth-in-sentencing law); however, when both plaintiffs went before their parole review hearings, the Parole Authority gave each plaintiff more time for each individual offense, than the offense carried during the time the offenses were committed.

The old and the new statutes only dictate a maximum of #12 months for simple assault offenses—under the old law as well as the under the new law. The Parole Authorities gave plaintiffs #14 to #28 months for each assault offense on their records—which in itself violates the ex post facto clause.

The Supreme Court teaches that discretionary aspects of a law do not preclude an ex post facto violation. The Supreme Court had repeatedly stated that a criminal defendant need not show that she or he certainly would have received a less onerous punishment under a prior law to establish constitutional violation; a law need not impair a

"vested right" to violate the ex post facto prihibition. *998 F.2d 721 Flemming v. Oregon Bd. of Paroles (1993).*

V. Conclusion

Plaintiffs have reasonably demonstrated that these claims are recognizable in federal court under civil action. Plaintiffs are challenging the method of parole decision-making, rather than its outcome. Plaintiffs entire claim is about "due process" being denied proper parole procedures.

VII. Relief

Plaintiffs request declaratory and injunctive relief to vindicate their alleged due process rights.

I declare under penalty of perjury that the foregoing is true and correct.

10-10-99 /s/Rogerico Johnson
signature of plaintiff

Nov. 4th 1999 /s/Derrick Matthews
signature of plaintiff

[Reproduced as in original including spelling, etc.]

The United States District Court
Northern District of Ohio

Rogerico J. Johnson and ~~Derriek Matthews~~ Pro se Plaintiffs	4:00 CV 1075 Judge Economus
vs.	Motion for Class Certification
Margaret T. Ghee Defendant	

Plaintiffs request Class Certification under Rule 23, Fed. R. Civ. P. and Rule 23(b)(2).

1. The class is so numerous that joinder of all class members is necessary.
2. Most class members are illiterate or poorly educated and have absolutely no knowledge in how to litigate a civil action.
3. There are questions of law and facts common to the class members and plaintiffs.

The violation of due process in Plaintiffs claim is a violation to all prisoners in the State of Ohio—because it is the procedure that of the Adult Parole Authorities that are improper and that which we challenge.

Further Affidavit saying naught

10-6-99
date

/s/Rogerico Johnson
signature

Sworn to and subscribed before me this 6 day of Oct. 1999

/s/Tracy England
Notary Public
Commission Expires
9-19-2003

United States District Court
Northern District of Ohio

Affidavit from Prisoners
In the Northern District
Of Ohio

Affidavit of facts:

The State of Ohio has created a right to parole review. Ohio Revised Code 2967.13 & .19; Ohio Administrative Rules 5120:1-1-03, 1-1-07, 1-1-10, 1-1-11.

The right to parole review cannot be arbitrarily vitiated without depriving prisoners of a liberty interest in violation of due process

Also, within this right to a parole review, the most basic due process right is the right to hear and be heard.

Prisoners have a right to hear, i.e., to be informed of the evidence against them so they can respond to it. Prison officials and parole authorities are obligated to take the necessary steps so prisoners can hear and be heard.

Jackson v. Cain 864 f.2d 1235 (5th Cir. 1989)

Ohio Administrative Rule 5120:1-1-11(C):
The hearing may be conducted by the Parole Board or a quorum thereof, for the purpose of making a decision for or against release or be conducted for the purpose of making a recommendation for or against release to the Parole Board by a panel consisting of one or more members of the Parole Board and one or more Parole Board hearing officers as designated by the Chairman of the Parole Board. I prisoner Johnson, Rogerico, interpret and understand the above caption of DAR 5120:1-1-11(C) to mean that it must be at least (#2) two people present at each and every Parole Board hearing; (1 Parole Board member and 1 Parole Board hearing

officer) representing the Parole Board before a decision can be impartial and a hearing can be full and rendered fair.

I prisoner Johnson, Rogerico, became eligible and was seen by the Parole Board on 4-9-99 and the decision rendered resulted in me receiving #10 years.

1. This particular hearing was conducted by only one Parole Board representative.
2. I was not allowed to engage, part-take or extend any form of input in this hearing, except receive the written decision—that was decided by this same one Parole Board representative, who denied me an opportunity to speak at his hearing in my own behalf.

Both of these indiscretions are direct examples that I did not receive a full and fair hearing; as a result, the Adult Parole Authority violated my due process rights that are guaranteed under the 14th Amendments to the U.S. Constitution.

I swear the above statements are true and correct.
Further, Affiant sayeth naught.

/s/Rogerico Johnson
Signature
Ohio State Penitentiary
878 Coitsville-Hubbard Rd.
Youngstown, Ohio 44505

Sworn to and subscribed before me
This 6 day of Oct. 1999
/s/Tracy England
Notary Public
Commission Expires 9-19-2003

United States District Court
Northern District of Ohio

Affidavit from Prisoners
In the Northern District
Of Ohio

Affidavit of facts:

The State of Ohio has created a right to parole review. Ohio Revised Code 2967.13 & .19; Ohio Administrative Rules 5120:1-1-03, 1-1-07, 1-1-10, 1-1-11.

The right to parole review cannot be arbitrarily vitiated without depriving prisoners of a liberty interest in violation of due process

Also, within this right to a parole review, the most basic due process right is the right to hear and be heard.

Prisoners have a right to hear, i.e., to be informed of the evidence against them so they can respond to it. Prison officials and parole authorities are obligated to take the necessary steps so prisoners can hear and be heard.

Jackson v. Cain 864 f.2d 1235 (5th Cir. 1989)

Ohio Administrative Rule 5120:1-1-11(C):
The hearing may be conducted by the Parole Board or a quorum thereof, for the purpose of making a decision for or against release or be conducted for the purpose of making a recommendation for or against release to the Parole Board by a panel consisting of one or more members of the Parole Board and one or more Parole Board hearing officers as designated by the Chairman of the Parole Board. I prisoner Andre Smith, 189595, interpret and understand the above caption of DAR 5120:1-1-11(C) to mean that it must be at least (#2) two people present at each and every Parole Board hearing; (1 Parole Board member and 1 Parole Board hearing

officer) representing the Parole Board before a decision can be impartial and a hearing can be full and rendered fair.

I prisoner Andre Smith 189595, became eligible and was seen by the Parole Board on 3-18-99 and the decision rendered resulted in me receiving 10 years.

1. This particular hearing was conducted by only one Parole Board representative.
2. I was not allowed to engage, part-take or extend any form of input in this hearing, except receive the written decision—that was decided by this same one Parole Board representative, who denied me an opportunity to speak at his hearing in my own behalf.

Both of these indiscretions are direct examples that I did not receive a full and fair hearing; as a result, the Adult Parole Authority violated my due process rights that are guaranteed under the 14th Amendments to the U.S. Constitution.

I swear the above statements are true and correct.
Further, Affiant sayeth naught.

/s/Andre Smith
Signature
Ohio State Penitentiary
878 Coitsville-Hubbard Rd.
Youngstown, Ohio 44505

Sworn to and subscribed before me
This 6 day of Oct. 1999
/s/Tracy England
Notary Public
Commission Expires 9-19-2003

UNITED STATES DISTRICT COURT

Affidavit From Prisoners in the Northen District of Ohio

Affidavit of Facts:

The State of Ohio had created a right to Parole Review. Ohio Revised Code §2967.13, & 19; Ohio Administrative Rules 5120:1-1-03, 1-1-07, 1-1-10, 1-1-11. The right to Parole Review cannot be arbitrarily vitiated without depriving prisoners of a liberty interest in violation of Due process.

Also, within this right to a Parole Review the most basic due process right is the right to hear & be heard.
Prisoners have a right to hear.i.e, to be informed of the evidence against them so they can respond to it. Prison Officials & Parole Authorities are obligated to take the necessary steps so prisoners can hear and be heard.

Jackson v. Cain. 864 F.2d 1235 (5th Cir. 1989)

Ohio Administrative Rule 5120:1-1-11(C):

The hearing may be conducted by the Parole Board or a quorum thereof, for the purpose of making a decision for or against release or be conducted for the purpose of making a recommendation for or against release to the Parole Board by a panel consisting of one or more members of the Parole Board and one or more Parole Board hearing officers as designated by the Chairman of the Parole Board.

I Prisoner Thomas Blackmon, interpret & understand the above caption of OAR 5120:1-1-11(C) to mean that it must be at least (#2) two people present at each & every Parole Board hearing, (1.Parole Board emmber &1.Parole

Board hearing Officer) representing the Parole Board before a decision can be impartial & a hearing can be full and rendered fair.

I Prisoner Thomas Blackmon, became eligible & was seen by the Parole Board on Sept. 1999, and the decision rendered resulted in me receiving 10 years.

1. This particular hearing was conducted by only one Parole Board representative.

2. I was not allowed to engage, partake or extend any form of in-put in this hearing, except receive the written decision—that was decided by this same one Parole Board representative, who denied me an opportunity to speak at this hearing on my own behalf.

Both of these indiscretions are direct examples that I did not receive a full & fair hearing; As a result, the Adult Parole Authorities violated my due process rights that are guaranteed under the 14th. Amendments to the U.S. Constitution.

I swear the above statements are true & correct.
Further, Affiant sayeth naught.

/s/Thomas Blackmon
Signature
Ohio State Penitentiary
878 Coitsville-Hubbard Rd.
Youngstown, Ohio 44505

Sworn to and subscribed before me this 3rd day of December. 1999.

/s/Linda Ball
Notary Public
Linda R. Ball, Norary Public
State of Ohio
My Commission Expires
February 13, 2003

United States District Court
Northern District of Ohio

Affidavit from Prisoners
In the Northern District
Of Ohio

Affidavit of facts:

The State of Ohio has created a right to parole review. Ohio Revised Code 2967.13 & .19; Ohio Administrative Rules 5120:1-1-03, 1-1-07, 1-1-10, 1-1-11.

The right to parole review cannot be arbitrarily vitiated without depriving prisoners of a liberty interest in violation of due process

Also, within this right to a parole review, the most basic due process right is the right to hear and be heard.

Prisoners have a right to hear, i.e., to be informed of the evidence against them so they can respond to it. Prison officials and parole authorities are obligated to take the necessary steps so prisoners can hear and be heard.

Jackson v. Cain 864 f.2d 1235 (5th Cir. 1989)

Ohio Administrative Rule 5120:1-1-11(C):
The hearing may be conducted by the Parole Board or a quorum thereof, for the purpose of making a decision for or against release or be conducted for the purpose of making a recommendation for or against release to the Parole Board by a panel consisting of one or more members of the Parole Board and one or more Parole Board hearing officers as designated by the Chairman of the Parole Board. I prisoner Derrick Mathews R142-546, interpret and understand the above caption of DAR 5120:1-1-11(C) to mean that it must be at least (#2) two people present at each and every Parole

Board hearing; (1 Parole Board member and 1 Parole Board hearing officer) representing the Parole Board before a decision can be impartial and a hearing can be full and rendered fair.

I prisoner Derrick Mathews R142-546, became eligible and was seen by the Parole Board on 8-7-98 and the decision rendered resulted in me receiving 10 years.

1. This particular hearing was conducted by only one Parole Board representative.
2. I was not allowed to engage, part-take or extend any form of input in this hearing, except receive the written decision—that was decided by this same one Parole Board representative, who denied me an opportunity to speak at his hearing in my own behalf.

Both of these indiscretions are direct examples that I did not receive a full and fair hearing; as a result, the Adult Parole Authority violated my due process rights that are guaranteed under the 14th Amendments to the U.S. Constitution.

I swear the above statements are true and correct.
Further, Affiant sayeth naught.

/s/Derrick Mathews R142-546
Signature
Ohio State Penitentiary
878 Coitsville-Hubbard Rd.
Youngstown, Ohio 44505

Sworn to and subscribed before me
This 23rd day of December 1999
/s/Linda (Ball) Gabauer
Notary Public
Linda R. Ball, Notary Public
State of Ohio
My Commission Expires February 13, 2003

United States District Court
Northern District of Ohio

Affidavit from Prisoners
In the Northern District
Of Ohio

Affidavit of facts:

The State of Ohio has created a right to parole review. Ohio Revised Code 2967.13 & .19; Ohio Administrative Rules 5120:1-1-03, 1-1-07, 1-1-10, 1-1-11.

The right to parole review cannot be arbitrarily vitiated without depriving prisoners of a liberty interest in violation of due process

Also, within this right to a parole review, the most basic due process right is the right to hear and be heard.

Prisoners have a right to hear, i.e., to be informed of the evidence against them so they can respond to it. Prison officials and parole authorities are obligated to take the necessary steps so prisoners can hear and be heard.

Jackson v. Cain 864 f.2d 1235 (5th Cir. 1989)

Ohio Administrative Rule 5120:1-1-11(C):
The hearing may be conducted by the Parole Board or a quorum thereof, for the purpose of making a decision for or against release or be conducted for the purpose of making a recommendation for or against release to the Parole Board by a panel consisting of one or more members of the Parole Board and one or more Parole Board hearing officers as designated by the Chairman of the Parole Board. I prisoner Andre Choulet, interpret and understand the above caption of DAR 5120:1-1-11(C) to mean that it must be at least (#2) two people present at each and every Parole Board hearing;

(1 Parole Board member and 1 Parole Board hearing officer) representing the Parole Board before a decision can be impartial and a hearing can be full and rendered fair.

I prisoner Andre Choulet, became eligible and was seen by the Parole Board on 11/6/98 and the decision rendered resulted in me receiving 10 years, 7 months.

1. This particular hearing was conducted by only one Parole Board representative.
2. I was not allowed to engage, part-take or extend any form of input in this hearing, except receive the written decision—that was decided by this same one Parole Board representative, who denied me an opportunity to speak at his hearing in my own behalf.

Both of these indiscretions are direct examples that I did not receive a full and fair hearing; as a result, the Adult Parole Authority violated my due process rights that are guaranteed under the 14th Amendments to the U.S. Constitution.

I swear the above statements are true and correct.
Further, Affiant sayeth naught.

/s/Andre Choulet
Signature
Ohio State Penitentiary
878 Coitsville-Hubbard Rd.
Youngstown, Ohio 44505

Sworn to and subscribed before me
This 22nd day of November 1999
/s/Linda Ball
Notary Public
Linda R. Ball, Notary Public
State of Ohio
My Commission Expires February 13, 2003

United States District Court
Northern District of Ohio

Affidavit from Prisoners
In the Northern District
Of Ohio

Affidavit of facts:

The State of Ohio has created a right to parole review. Ohio Revised Code 2967.13 & .19; Ohio Administrative Rules 5120:1-1-03, 1-1-07, 1-1-10, 1-1-11.

The right to parole review cannot be arbitrarily vitiated without depriving prisoners of a liberty interest in violation of due process

Also, within this right to a parole review, the most basic due process right is the right to hear and be heard.

Prisoners have a right to hear, i.e., to be informed of the evidence against them so they can respond to it. Prison officials and parole authorities are obligated to take the necessary steps so prisoners can hear and be heard.

Jackson v. Cain 864 f.2d 1235 (5th Cir. 1989)

Ohio Administrative Rule 5120:1-1-11(C):
The hearing may be conducted by the Parole Board or a quorum thereof, for the purpose of making a decision for or against release or be conducted for the purpose of making a recommendation for or against release to the Parole Board by a panel consisting of one or more members of the Parole Board and one or more Parole Board hearing officers as designated by the Chairman of the Parole Board. I prisoner Burl Dillon, interpret and understand the above caption of DAR 5120:1-1-11(C) to mean that it must be at least (#2) two people present at each and every Parole Board hearing; (1 Parole Board member and 1 Parole Board hearing officer)

representing the Parole Board before a decision can be impartial and a hearing can be full and rendered fair.

I prisoner Burl Dillon, became eligible and was seen by the Parole Board on 11-22-99 and the decision rendered resulted in me receiving 10 years.

1. This particular hearing was conducted by only one Parole Board representative.
2. I was not allowed to engage, part-take or extend any form of input in this hearing, except receive the written decision—that was decided by this same one Parole Board representative, who denied me an opportunity to speak at his hearing in my own behalf.

Both of these indiscretions are direct examples that I did not receive a full and fair hearing; as a result, the Adult Parole Authority violated my due process rights that are guaranteed under the 14th Amendments to the U.S. Constitution.

I swear the above statements are true and correct.
Further, Affiant sayeth naught.

/s/Burl Dillon
Signature
Ohio State Penitentiary
878 Coitsville-Hubbard Rd.
Youngstown, Ohio 44505

Sworn to and subscribed before me
This 15 day of February
/s/April J. Peters
Notary Public
April J. Peters, Notary Public
in and for the State of Ohio
My Commission Expires March 1, 2004

United States District Court
Northern District of Ohio

Affidavit from Prisoners
In the Northern District
Of Ohio

Affidavit of facts:

The State of Ohio has created a right to parole review. Ohio Revised Code 2967.13 & .19; Ohio Administrative Rules 5120:1-1-03, 1-1-07, 1-1-10, 1-1-11.

The right to parole review cannot be arbitrarily vitiated without depriving prisoners of a liberty interest in violation of due process

Also, within this right to a parole review, the most basic due process right is the right to hear and be heard.

Prisoners have a right to hear, i.e., to be informed of the evidence against them so they can respond to it. Prison officials and parole authorities are obligated to take the necessary steps so prisoners can hear and be heard.

Jackson v. Cain 864 f.2d 1235 (5th Cir. 1989)

Ohio Administrative Rule 5120:1-1-11(C):
The hearing may be conducted by the Parole Board or a quorum thereof, for the purpose of making a decision for or against release or be conducted for the purpose of making a recommendation for or against release to the Parole Board by a panel consisting of one or more members of the Parole Board and one or more Parole Board hearing officers as designated by the Chairman of the Parole Board. I prisoner Griffin 296-336, interpret and understand the above caption of DAR 5120:1-1-11(C) to mean that it must be at least (#2) two people present at each and every Parole Board hearing; (1 Parole Board member and 1 Parole Board hearing officer)

representing the Parole Board before a decision can be impartial and a hearing can be full and rendered fair.

I prisoner Griffin #296-336, became eligible and was seen by the Parole Board on Feb. 14 2000 and the decision rendered resulted in me receiving 10 years.

1. This particular hearing was conducted by only one Parole Board representative.
2. I was not allowed to engage, part-take or extend any form of input in this hearing, except receive the written decision—that was decided by this same one Parole Board representative, who denied me an opportunity to speak at his hearing in my own behalf.

Both of these indiscretions are direct examples that I did not receive a full and fair hearing; as a result, the Adult Parole Authority violated my due process rights that are guaranteed under the 14th Amendments to the U.S. Constitution.

I swear the above statements are true and correct.
Further, Affiant sayeth naught.

/s/Mr. Delricious Griffin
Signature
Ohio State Penitentiary
878 Coitsville-Hubbard Rd.
Youngstown, Ohio 44505
#296-336

Sworn to and subscribed before me
This 22nd day of February
/s/Linda (Ball) Gabauer
Notary Public
Linda R. Ball, Notary Public
State of Ohio
My Commission Expires February 13, 2003

United States District Court
Northern District of Ohio

Affidavit from Prisoners
In the Northern District
Of Ohio

Affidavit of facts:

The State of Ohio has created a right to parole review. Ohio Revised Code 2967.13 & .19; Ohio Administrative Rules 5120:1-1-03, 1-1-07, 1-1-10, 1-1-11.

The right to parole review cannot be arbitrarily vitiated without depriving prisoners of a liberty interest in violation of due process

Also, within this right to a parole review, the most basic due process right is the right to hear and be heard.

Prisoners have a right to hear, i.e., to be informed of the evidence against them so they can respond to it. Prison officials and parole authorities are obligated to take the necessary steps so prisoners can hear and be heard.

Jackson v. Cain 864 f.2d 1235 (5th Cir. 1989)

Ohio Administrative Rule 5120:1-1-11(C):
The hearing may be conducted by the Parole Board or a quorum thereof, for the purpose of making a decision for or against release or be conducted for the purpose of making a recommendation for or against release to the Parole Board by a panel consisting of one or more members of the Parole Board and one or more Parole Board hearing officers as designated by the Chairman of the Parole Board. I prisoner George M. Griffith Jr. #A235-353, interpret and understand the above caption of DAR 5120:1-1-11(C) to mean that it must be at least (#2) two people present at each and every Parole Board hearing; (1 Parole Board member and 1 Parole

Board hearing officer) representing the Parole Board before a decision can be impartial and a hearing can be full and rendered fair.

I prisoner George M. Griffith Jr. #A235-353, became eligible and was seen by the Parole Board on 4-22-99 and the decision rendered resulted in me receiving 5 ½ years.

1. This particular hearing was conducted by only one Parole Board representative.
2. I was not allowed to engage, part-take or extend any form of input in this hearing, except receive the written decision—that was decided by this same one Parole Board representative, who denied me an opportunity to speak at his hearing in my own behalf.

Both of these indiscretions are direct examples that I did not receive a full and fair hearing; as a result, the Adult Parole Authority violated my due process rights that are guaranteed under the 14th Amendments to the U.S. Constitution.

I swear the above statements are true and correct.
Further, Affiant sayeth naught.

/s/George M. Griffith Jr.
#A235-353
Signature
Ohio State Penitentiary
878 Coitsville-Hubbard Rd.
Youngstown, Ohio 44505
#296-336

Sworn to and subscribed before me
This 19 day of Nov 1999
/s/Tracy England
Notary Public

United States District Court
Northern District of Ohio

Affidavit from Prisoners
In the Northern District
Of Ohio

Affidavit of facts:

The State of Ohio has created a right to parole review. Ohio Revised Code 2967.13 & .19; Ohio Administrative Rules 5120:1-1-03, 1-1-07, 1-1-10, 1-1-11.

The right to parole review cannot be arbitrarily vitiated without depriving prisoners of a liberty interest in violation of due process

Also, within this right to a parole review, the most basic due process right is the right to hear and be heard.

Prisoners have a right to hear, i.e., to be informed of the evidence against them so they can respond to it. Prison officials and parole authorities are obligated to take the necessary steps so prisoners can hear and be heard.

Jackson v. Cain 864 f.2d 1235 (5th Cir. 1989)

Ohio Administrative Rule 5120:1-1-11(C):
The hearing may be conducted by the Parole Board or a quorum thereof, for the purpose of making a decision for or against release or be conducted for the purpose of making a recommendation for or against release to the Parole Board by a panel consisting of one or more members of the Parole Board and one or more Parole Board hearing officers as designated by the Chairman of the Parole Board. I prisoner M. Rush #R118225, interpret and understand the above caption of DAR 5120:1-1-11(C) to mean that it must be at least (#2) two people present at each and every Parole Board hearing; (1 Parole Board member and 1 Parole Board hearing

officer) representing the Parole Board before a decision can be impartial and a hearing can be full and rendered fair.

I prisoner Rush #R118225, became eligible and was seen by the Parole Board on 08-25-99 and the decision rendered resulted in me receiving 3 years.

1. This particular hearing was conducted by only one Parole Board representative.
2. I was not allowed to engage, part-take or extend any form of input in this hearing, except receive the written decision—that was decided by this same one Parole Board representative, who denied me an opportunity to speak at his hearing in my own behalf.

Both of these indiscretions are direct examples that I did not receive a full and fair hearing; as a result, the Adult Parole Authority violated my due process rights that are guaranteed under the 14th Amendments to the U.S. Constitution.

I swear the above statements are true and correct.
Further, Affiant sayeth naught.

/s/Michael A. Rush
#R118225
Signature
Ohio State Penitentiary
878 Coitsville-Hubbard Rd.
Youngstown, Ohio 44505
#296-336

Sworn to and subscribed before me
This 19 day of Nov 1999
/s/Tracy England
Notary Public

Supreme Court, U.S.
FILED
JUL 19 2004
OFFICE OF THE CLERK

(7)

No. 03-287

In The Supreme Court Of The United States

REGINALD WILKINSON, Director, *et al.*,
Petitioners,

v.

WILLIAM DWIGHT DOTSON, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Heck v. Humphrey, 512 U.S. 477 (1994), holds that a prisoner cannot advance a claim under 42 U.S.C. § 1983 that would "necessarily imply the invalidity" of a conviction or sentencing decision. *Id.* at 487. This is *Heck*'s so-called "favorable termination requirement."

These incarcerated Respondents brought § 1983 actions seeking to compel immediate rehearing of Parole Board decisions under which they will serve specified terms of incarceration, until 2005 and 2009 respectively, before they are again considered for release. That raises the following questions:

1. When a prisoner invokes § 1983 to challenge parole proceedings, does *Heck* bar those claims where success by the prisoner on the merits would result only in a new parole hearing and not necessarily guarantee earlier release from prison?

2. Does a federal court judgment ordering a new parole hearing "necessarily imply the invalidity of" the decision at the previous parole hearing for purposes of *Heck v. Humphrey*?

LIST OF PARTIES

The Petitioners are Ohio prison officials:

Reginald Wilkinson, the Director of the Ohio Department of Rehabilitation and Correction ("ODRC").

Margarette Ghee, the former chair of the Ohio Parole Board.

The Respondents are two prisoners in the custody of ODRC:

William D. Dotson
Rogerico J. Johnson

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OPINIONS BELOW

This case arises from two separate cases that were consolidated for *en banc* review, *Dotson v. Wilkinson* and *Johnson v. Ghee*.

The district court decision in *Dotson* was captioned as *Dotson v. Wilkinson*, Case No. 3:00 CV-7303 (N.D. Ohio, Aug. 7, 2000). It is reproduced at Pet. App. 47a-51a. The panel decision from the court of appeals was reported as *Dotson v. Wilkinson*, 300 F.3d 661 (6th Cir. 2002). It is reproduced at Pet. App. 36a-46a. The Sixth Circuit's *en banc* decision is reported as *Dotson v. Wilkinson*, 329 F.3d 463 (6th Cir. 2003). That decision is reproduced at App. 4a-35a.

The district court decision in *Johnson* is captioned as *Johnson v. Ghee*, Case No. 4:00 CV 1075 (N.D. Ohio, July 16, 2000). It is reproduced at Pet. App. 52a-56a. The Sixth Circuit did not issue a panel opinion. Instead, it consolidated *Johnson* with *Dotson* for *en banc* disposition. Accordingly, the Sixth Circuit decision in *Johnson* is also reported as *Dotson v. Wilkinson*, 329 F.3d 463 (6th Cir. 2003). As noted above, that decision is reproduced at Pet. App. 4a-35a.

JURISDICTIONAL STATEMENT

The Sixth Circuit entered the final judgment below on May 19, 2003. Petitioners filed the petition seeking certiorari on August 18, 2003, and the Court granted certiorari on March 22, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves two sets of federal statutes. The first is 42 U.S.C. § 1983, which states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

The other relevant statutes are the federal habeas corpus laws, 28 U.S.C. §§ 2241 through 2254. They are reproduced in the Appendix to the Petition for Certiorari ("Pet. App.") at 57a, *et seq.*

Several provisions of Ohio law are also involved in this case. They are Ohio Rev. Code Ann. §§ 2967.03, 2967.12, 2927.13 (Anderson 1994); Ohio Admin. Code §§ 5120:1-1-07 (1975 and 1997), 5120:1-1-08 (1981), 5120:1-1-09 (1981); 5120:1-1-10 (1979) and (1988), 5120:1-1-11 (1979), 5120:1-1-20 (1998) and ODRC Policies 501-36 (1994) and 501-38 (1994). Those individual provisions are reproduced in either the Joint Appendix ("J.A.") or the Supplement to this brief ("Supp.")

INTRODUCTION

This case asks the Court to reaffirm the line separating those claims that state prisoners may advance under § 1983 from those they may not, this time in the context of parole decisions. The Court's precedent on this issue establishes one straightforward proposition—a prisoner cannot use § 1983 as a vehicle to mount a collateral attack that would "necessarily imply the invalidity of" state court convictions or sentences. See, *e.g.*, *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). And *Edwards v. Balisok*, 520 U.S. 641 (1997), confirms both that (1) administrative decisions that affect the duration of a prisoner's confinement (there, decisions regarding good-time credits) count as "sentences," and (2) a federal decision that would "necessarily imply" that a State must vacate a prior hearing and provide the prisoner a re-hearing counts as "invalidation."

The result in this case, then, should have been a straightforward dismissal of the Respondents' § 1983 claims. Johnson and Dotson both advance claims that, if successful, would mandate that Ohio vacate parole decisions impacting the duration of their confinement, and both seek an order requiring an immediate new hearing at which they would be eligible for release. As such, *Heck* and its progeny bar their claims. The court below reached a contrary result because it adopted a narrow understanding of "invalidate" that limits that term to those federal decisions that will "inevitably or automatically result in earlier release." *Dotson v. Wilkinson*, 329 F.3d 463, 471 (6th Cir. 2003), Pet. App. 17a.

The lower court's result directly conflicts with the language and spirit of this Court's precedents, which establish that it is the implication of the federal judgment *for the state decision* that determines "invalidation," not the immediate impact on the prisoner's confinement. Indeed, if

anything, this case is easier than *Balisok*, for there, the prisoner sought only declaratory relief, money damages, and injunctions regarding future hearings; whereas here, each Respondent seeks an order requiring the State to ignore its past sentencing decision and provide him an immediate new hearing.

The court below erred on another level as well. *Heck*'s bar reprises and extends the holding in *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Under that rule, habeas is the *exclusive* vehicle for those prisoner claims that fall within the "core of habeas." *Preiser*, 411 U.S. at 489. For such claims, the specific provisions of habeas supplant the more general remedy provided under the broad language of § 1983. The claims advanced here—which challenge parole hearings and seek immediate new hearings at which parole may be granted—fall within habeas's core. Accordingly, under settled law from *Preiser* forward, Respondents must advance their claims via habeas.

The lower court's refusal to give appropriate breadth to *Heck*, *Balisok* and *Preiser* undercuts the comity concerns animating those decisions. A recurrent theme in this Court's jurisprudence on prisoner claims is the need to respect state decision-making processes and to offer States the first opportunity to correct any constitutional errors that occur. The state court exhaustion requirement in federal habeas, a requirement § 1983 lacks, serves those objectives. The decision below, which throws open § 1983 to a new class of claims, by contrast, undercuts comity and federalism. Accordingly, the Court should reverse the decision below, and it should hold that Johnson and Dotson may not advance their claims under § 1983.

STATEMENT OF THE CASE

Two sets of facts are relevant to this case: the nature of the parole system resulting in the decisions challenged here, and the course of proceedings below.

A. Ohio's parole system

1. Eligibility and release standards

Ohio employs an indeterminate sentencing system for most crimes committed before July 1, 1996.[1] Under that system, the court sets the minimum and maximum term of the sentence. The Ohio Parole Board, a unit of the executive-branch Adult Parole Authority ("APA"), then determines whether the inmate will be released before the maximum sentence and, if so, when release will occur. *Woods v. Telb*, 89 Ohio St. 3d 504, 511-12, 733 N.E.2d 1103 (2000).

To be released, a prisoner must first become "eligible" for parole. He then has a hearing (the "release hearing"), at which the hearing officers determine whether he is "suitable" for parole (*i.e.*, whether he should be released). The process for determining eligibility, conducting the release hearing, and making the suitability determination (*i.e.*, the release decision) is controlled by (1) statute, (2) administrative

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[1] Ohio's sentencing laws were extensively amended in 1996, eliminating both indeterminate sentences and parole. Sentences for those like Respondents, however, who were convicted of crimes committed before July 1, 1996, continue to be controlled by pre-1996 law. *State ex rel. Lemmon v. Ohio Adult Parole Authority*, 78 Ohio St. 3d 186, 677 N.E.2d 347 (1997). All references to the Ohio Revised Code are to the Code as it existed on June 30, 1996, which continues to control Respondents' cases. Ohio Rev. Code Ann. § 2967.021(A) (Anderson 1996). The Code provisions reproduced in the Supplement (bound with this Brief) are also the 1996 versions.

regulations with the force of law, *Lyden Co. v. Tracy*, 76 Ohio St. 3d 66, 69, 666 N.E.2d 556 (1996), and (3) non-binding Parole Board guidelines.

A prisoner's initial parole eligibility date is set by statute. Ohio Rev. Code Ann. § 2967.13(A), (B) (Anderson 1994), Supp. 2. It is generally after the prisoner has served two-thirds of his minimum sentence, or after 15 years if he is serving a life sentence. *Id.*

Once the prisoner reaches his initial eligibility date, he receives a release hearing. The statutory standard for release is broad. It authorizes parole if the APA determines it "would further the interests of justice and be consistent with the welfare and security of society." Ohio Rev. Code Ann. § 2967.03 (Anderson 1994), Supp. 1. Regulations identify situations in which the Parole Board *must* decline parole, such as when there is a substantial reason to believe that the inmate will reoffend. See Ohio Admin. Code § 5120:1-1-07(A) (1975) J.A. 21; *id.*, (1997 version), Supp. 2-3. But it is well settled that the Parole Board *can* deny release "for any constitutionally permissible reason or for no reason at all." *Inmates of Orient Correctional Inst. v. Ohio State Adult Parole Auth.*, 929 F.2d 233, 236 (6th Cir. 1991).

In addition to the statutes and regulations, the Parole Board relies on internal guidelines to assist it in making the release decision. In 1998, the Parole Board replaced its earlier guidelines with new guidelines (the "1998 Guidelines") that use a two-factor grid system. The first is the likelihood that the inmate will reoffend. The second is the severity of the crime that led to the incarceration. Dotson Complaint ¶ 6 and Ex. D, J.A. 14, 27.[2] The intersection of

[2] Dotson's complaint sets forth the matrix itself, but does not capture the detail involved. The full guidelines included 101 pages of detailed rules to establish procedures for analyzing the risk of reoffense and the severity of a prisoner's crime. Ohio's parole guidelines can be accessed online at this site: http://www.drc.state.oh.us/web/Guideline%20Manual04.pdf (last visited July 15, 2004).

those factors on the grid yields a suggested range of months that the inmate should serve before being released.

Although the Parole Board is free to depart from those non-binding guidelines, *State ex rel. Vaughn v. Ohio Adult Parole Auth.*, 85 Ohio St. 3d 378, 379, 708 N.E.2d 720 (1999), it usually follows them. As a result, inmates convicted of more serious crimes generally serve longer periods of incarceration under the 1998 Guidelines than they did under the prior guidelines.

2. Release hearings and decisions

Two types of parole decisions are at issue here: those made at release hearings and those made at so-called "halfway reviews." At release hearings, parole officials make decisions that impact a prisoner's sentence in two distinct ways. First, the parole official determines whether the prisoner should be released. Second, if the official denies parole, she sets the date of the next release hearing. Prisoners cannot be released in Ohio except through release hearings, Ohio Admin. Code § 5120:1-1-11(A) (1976), Supp. 5, so this has the effect of guaranteeing that the prisoner's incarceration will continue at least until that next hearing.

Parole Board policies govern the manner in which the release hearings are conducted. Before the hearing itself, parole officials must conduct a thorough pre-hearing review of the inmate's prison and parole files, ODRC Policy 501-36

§ VI(B)(3) (1994),[3] Supp. 11, and collect information about the prisoner from a variety of third-party sources, including the crime victim. Ohio Rev. Code Ann. 2967.12 (A) and (B), Supp. 1-2; ODRC Policy 501-38 § VI (1994), Supp. 17. The inmate receives two weeks' notice of the hearing. He is allowed to submit written information, and to appear and respond, both orally and in writing, to any information presented. ODRC Policy 501-36 § VI(A)(3), Supp. 10.

Regulations provide that the case is heard before either a hearing officer or a panel consisting of a hearing officer and one of the nine members of Ohio's Parole Board. *Id.* at §§ IV(A) and (B), VI(C)(4), (5), Supp. 8, 9, 12. The hearing covers several matters, including the details of the inmate's crime, the relative role of any codefendants in his case, the inmate's criminal and prison records, and the Parole Guidelines. *Id.* at § VI(C)(5), Supp. 12.

The officers then make the release decision. In deciding, they must consider all of the information collected through the hearing. Ohio Admin. Code §§ 5120:1-1-09 (1981), J.A. 23; 5120:1-1-07 (B) (1997), Supp. 3. See also

[3] Petitioners recognize that ODRC Policy 501-36 and several other administrative regulations, policies, and court decisions cited in this portion of our brief were not in the trial court records. However, appellate courts may consider judicially noticeable government documents not advanced below. R. Stern, E. Grossman, S. Shapiro & K. Geller, *Supreme Court Practice*, § 13.11(k)(1) (8th Ed. 2002). This Court has consistently taken judicial notice of such materials. *Thornton v. United States*, 271 U.S. 414, 420 (1926) (regulations); *Bowles v. United States*, 319 U.S. 33, 35 (1943) (decision); *Caha v. United States*, 152 U.S. 211, 221-222 (1894) (agency rules). All references to regulations and policies are to their form at the time of the parole decisions Respondents challenge here. Some of the regulations and policies cited have since been renumbered or otherwise reorganized, but all the procedures described in the text were required at the time of the decisions challenged here.

Ohio Admin. Code §§ 5120:1-1-08 (1981), J.A. 22; 5120:1-1-07 (C) (1997), Supp. 4-5 (listing other factors the hearing officer may consider). The officers then evaluate the case under the parole guidelines. ORDC Policy 501-36 § VI (C)(9), (D)(1)(c), Supp. 13, 14. The presiding official assesses each of the relevant factors (*i.e.*, the severity of crime and likelihood of reoffending). She then uses those factors to determine the suggested time of incarceration under the Parole Guidelines. Officials are free to ignore that suggestion, but they typically follow it.

The parole officials prepare a written decision that addresses two primary issues. First, the decision addresses whether the inmate should be released. Second, for those prisoners denied parole, the hearing officer sets the date at which the inmate will next receive a parole hearing. Inmates who are denied parole must also receive an explanation for the decision. *Id.* at § VI (D)(5), Supp. 15.

An inmate cannot be released without a formal hearing. Ohio Admin. Code § 5120:1-1-11(A) (1976), Supp. 5. Therefore, a decision setting the next parole hearing on a particular future date essentially precludes release before that later hearing date.[4]

3. Halfway reviews

Ohio regulations also provide, in some cases, for a "halfway review." In all cases in which the decision from the release hearing sets the next release hearing more than 20 months away, the inmate's file is reviewed no later than

[4] The only exception to this, as described in the next section, is when the release hearing is moved up as a result of a halfway review. But, even then, the deferral decision guarantees incarceration at least through that halfway review.

halfway through the deferral period. Ohio Admin. Code § 5120:1-1-20 (A), Supp. 5-6. (In April 1998, newer regulationa abolished halfway reviews for release decisions made after that date.)

At the halfway review, a hearing officer conducts a complete review of the inmate's parole and prison files to determine whether to move the prisoner's next release hearing up from its previously scheduled time. *Id.* at § (B), Supp. 6. The review focuses on the factors traditionally considered at a sentencing proceeding. These include the details of the inmate's crime, his prior criminal record, the problem areas underlying his criminal activity, and what programming he has pursued to address those problems. *Id.* at § (D), Supp. 6. The inmate receives notice and is allowed to submit written materials. *Id.* at § (C), Supp. 6.

Based on her review, the hearing officer recommends to the chair of the Parole Board whether or not to move up the next scheduled release hearing. The inmate may also respond to that recommendation. *Id.* at §§ (H), (I), Supp. 7-8. The chair then decides whether to advance the hearing. If not, the inmate is not considered for release until the hearing date set at his previous release hearing, and thus has no possibility of release until that time. Ohio Admin. Code § 5120:1-1-11(A), Supp. 5.

4. Ohio judicial remedies available to contest parole release decisions

Inmates have two ways to contest adverse parole release decisions in Ohio's courts. The first and broadest is declaratory judgment. "A declaratory judgment action is the proper remedy to determine the constitutionality or constitutional application of the parole-guidelines." *Hattie v. Anderson*, 68 Ohio St. 3d 232, 235, 626 N.E.2d 67 (1994).

Ohio's courts have also granted significant relief on non-constitutional grounds through such actions. *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St. 3d 456, 780 N.E 2d 548 (2002). The second remedy is mandamus, which can be used in limited circumstances. *Hattie*, 68 Ohio St.3d at 234.

B. The proceedings below

This case arises from two separate cases, one by Respondent Dotson and one by Respondent Johnson, that were consolidated for *en banc* consideration.

1. Dotson's claims and the district court's decision

An Ohio jury convicted Dotson of aggravated murder in 1981. He is currently serving a life sentence. Under Ohio law, he first became eligible for parole in 1995, and he had a release hearing at that time.[5] Dotson Complaint ¶¶ 1-3, 11, 12, J.A. 12, 16.

The Parole Board declined to parole Dotson. Additionally, due to the seriousness of his crime, the Board determined that Dotson should not receive a new release hearing until he had served ten more years. Accordingly, the Board set his next release hearing for June 2005. Dotson Complaint ¶ 12, J.A. 16.

Dotson received a halfway review in 2000, five years after the 1995 decision. Dotson Complaint ¶ 13, J.A. 16-17. The hearing officer analyzed the matters usually considered

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[5] Both district courts *sua sponte* dismissed Respondents' cases pursuant to 28 U.S.C. § 1915(e) for failure to state claims, before defendants moved or answered. Thus, the facts regarding Respondents' claims come exclusively from their respective complaints.

at such proceedings, as discussed above, under the 1998 Guidelines. He concluded that, under those Guidelines, Dotson was unlikely to be released until he had served 32.5 years (*i.e.*, until 2013). He thus determined that there was no reason to advance the 2005 hearing date, which had been set at the 1995 hearing, and that recommendation was apparently accepted. Dotson Complaint ¶¶ 13-16 and Ex. G, J.A. 16-17, 37.

Dotson did not seek administrative reconsideration or relief in Ohio's state courts. He instead brought this suit in federal court under 42 U.S.C. § 1983. His complaint, while not perfectly clear, appears to advance two ex post facto claims based on the use of the 1998 Guidelines at his halfway review. First, he contends that under the pre-1998 Guidelines, the halfway review could possibly have resulted in parole officials moving his next release hearing up from 2005, as he had already served the recommended 15 years before parole release. Because under the 1998 Guidelines his minimum recommended term was 390 months, however, the parole official concluded that there was no purpose in moving his hearing forward. Dotson Complaint ¶¶ 14-16, J.A. 17. Thus, he contends, use of the 1998 Guidelines unconstitutionally deprived him of an earlier release hearing. Second, Dotson challenged, also on ex post facto grounds, the parole officer's statement that the 1998 Guidelines would apply at his previously scheduled 2005 hearing. Complaint ¶¶ 1-4, J.A. 17-19.

Dotson sought both declaratory and injunctive relief. In particular, he wanted a declaration regarding his right to have the substantive parole standards and scheduling regulations in effect at the time of his conviction applied in his case, and an injunction ordering a "prompt and immediate parole hearing," using those standards. Dotson Complaint, J.A. 20. That is, he essentially wanted: (1) an immediate new release

hearing, thereby undoing the scheduling decision made at the 2000 halfway review, and (2) an order requiring the Parole Board to use the Guidelines and the scheduling regulations in effect at the time of his conviction in conducting any future release hearings.

The district court screened Dotson's case under 28 U.S.C. § 1915(e). It found that *Heck* barred Dotson's § 1983 claims because success on his claims would necessarily imply the invalidity of a prior parole decision. Pet. App. 47a-50a.

2. Johnson's claims and the district court's decision

Johnson is serving three indefinite sentences: one for aggravated robbery, one for various offenses related to his attempt to grab an officer's gun at a hearing contesting the robbery conviction, and one for assaulting a prison guard. *State v. Johnson*, No. 12687, 1992 Ohio App. Lexis 116 (Montgomery Co. App. May 16, 1992); *State v. Johnson*, No. 11743, 1992 Ohio App. Lexis 133 (Montgomery Co. App. Jan. 17, 1992); *State v. Johnson*, No. 98CR065 (Scioto Co. C.P. Feb. 26, 1998). Johnson Complaint, J.A. 43, 45; Affidavit, J.A. 55-56.

Johnson had his initial parole hearing in April 1999. The outcome of that hearing was a decision (1) denying Johnson release, and (2) setting his next release hearing for 2009 (*i.e.*, ten years away).

Johnson then brought a § 1983 action, in which he alleged that the hearing violated his rights under the Ex Post Facto Clause in two ways. First, he objected that parole officials relied on the 1998 Guidelines, as he contends that the pre-1998 Guidelines should apply because his crimes

were committed before 1998. Second, he claimed that the Parole Board's decision to set his second release hearing for ten years away was improper, because that period was longer than the five years authorized by regulations in effect at the time of his conviction. He also claimed that the hearing violated the Due Process Clause in a variety of ways: the Parole Board allegedly conducted the hearing without the proper complement of parole officials, allegedly relied on false information in deciding his case and allegedly denied him the right to speak at the hearing. Johnson Complaint at unnumbered pp. 3-7, J.A. 42-53.

Although his initial complaint sought unspecified declaratory and injunctive relief, *id.* at 7, J.A.. 53, his briefing in the Sixth Circuit clarified that the relief he sought was a new parole hearing, at which he would be considered for immediate release. Appellant's Opening Brief at pp. 10, 15 ("A new . . . parole hearing is the relief Johnson seeks . . ."), 19-20 ("If successful, Johnson's § 1983 claim gets him a new parole hearing . . . .").

As with Dotson's claim, the district court screened Johnson's case pursuant to 28 U.S.C. § 1915(e) and dismissed it before service, concluding that his claims were *Heck*-barred. Pet. App. 52a-55a.

3. The Sixth Circuit's decisions

Both respondents filed timely *pro se* appeals under 28 U.S.C. § 1291. The State defendants waived briefing in *Dotson*, and the matter was submitted to a Sixth Circuit panel for decision. Meanwhile, the court of appeals appointed counsel in *Johnson*, and the appeal was fully briefed and argued before a separate panel.

While *Johnson* was pending, the *Dotson* panel issued a published decision reversing the district court's decision in that case. See *Dotson v. Wilkinson*, 300 F.3d 661 (6th Cir. 2002), Pet. App. 36a-46a. The panel held that *Heck* does not apply unless a prisoner's § 1983 claim would, if successful, "necessarily affect the duration of his confinement." The panel concluded that Dotson's claims did not fall into this category because, "even if successful, [they] will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff." *Id.* at 666, Pet App. 45a (quoting *Heck*, 512 U.S. at 487) (emphasis added by court of appeals).

The full Circuit then decided *sua sponte* to rehear *Dotson en banc*, together with Johnson's case and a third appeal involving the same issue. The *en banc* court reversed and reinstated Dotson's and Johnson's claims. *Dotson v. Wilkinson*, 329 F.3d 463 (6th Cir. 2003).[6]

In a 6-4 decision, the majority held that Respondents' claims were not *Heck*-barred for two reasons. The primary rationale was that a § 1983 claim "necessarily implies the invalidity of a prisoner's conviction or sentence" under *Heck only if* it "will inevitably or automatically result in an earlier release." *Dotson*, 329 F.3d at 471, Pet App. 17a. According to the majority, while the details of Dotson's and Johnson's claims varied, their claims were the same in one key respect—each prisoner would gain only a new *hearing* if successful. Neither would inevitably receive immediate or

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[6] In a separate opinion, an equally-divided court affirmed the dismissal of a prisoner's claim in the third case. See *Goodwin v. Ghee*, 330 F.3d 446 (6th Cir. 2003).

speedier release, because the outcomes of the new hearings would be uncertain. The majority therefore concluded that the Respondents' claims were not *Heck*-barred.

Its second, and only partially developed, rationale was that Parole Board decisions are not the types of decisions protected by *Heck*. The majority stated, with little explanation, that the *Heck* rule "properly refers only to" claims implicating "the decision of a convicting court." 329 F.3d at 470, n.2, Pet. App. 35a.

The dissent reached opposite conclusions on both points. It rejected the threshold proposition that *Heck* protects only judicial decisions "because *Edwards* [*v. Balisok*] itself was dealing with the judgment of an administrative body" when it found the claim considered there *Heck*-barred. 329 F.3d at 474 (Gilman, J. dissenting), Pet. App. 24a.

The dissent also disputed the majority's analysis of what types of claims "necessarily imply the invalidity of a conviction or sentencing decision." It rejected the conclusion that a claim must result in earlier release to run afoul of *Heck*. The dissent instead focused on whether the claim would nullify a conviction or sentence, without regard to the effect of that nullification on the claimant's confinement. "In other words, it is the implied invalidity of the administrative hearing itself . . . that is an impermissible result of a § 1983 claim." *Id.* at 474, Pet App. 23a. The dissent found support for that approach in *Balisok*, which applied the *Heck* test to a claim that would result only in rehearing rather than in a guaranteed earlier release, *id.*, Pet. App. 24a, and applied that analysis to Johnson's claims. It concluded that those claims, which "ask[] that [a] hearing be 'redone,'" were "the very type of attack on an underlying sentence that *Heck* and *Edwards* expressly prohibit." *Id.* at 479, Pet. App. 34a.

SUMMARY OF ARGUMENT

The court below properly recognized that prisoners cannot use § 1983 to advance claims that "necessarily imply the invalidity" of otherwise binding state sentencing decisions. See *Heck*, 512 U.S. at 487. Application of that principle here should have been straightforward. As explained below, Respondents' § 1983 claims challenge extant state sentencing decisions, and success on their claims would render the decisions invalid by requiring the State to provide new parole hearings.

The court below, however, improperly held that, because success on the claims would result only in rehearing, rather than outright release, *Heck* did not control. According to the court, a decision "necessarily implies the invalidity" of a previous state sentencing decision only if it would "inevitably or automatically result in earlier release." 329 F.3d at 471, Pet. App. 179. And, because here the rehearings might again result in parole denials, that condition was not met.

Four reasons demonstrate why the "inevitable or automatic earlier release" standard is the incorrect dividing line for separating those prisoner claims that can be advanced under § 1983 from those that cannot. First, the Court's statements in *Heck* and *Balisok*, as well as the facts and results in those cases, make it plain that invalidation is measured by the implications of the federal claim *for the state decision*, not the implications for the prisoner's confinement. And, as the Court held in *Balisok*, an order that implies that a State must vacate a first decision and undertake a second hearing "implies the invalidity" of the first decision. Thus, as success on their claims would entitle Johnson and Dotson to rehearings and new parole decisions (to be sure, decisions that may again deny parole), they are seeking to

"invalidate" sentencing decisions and cannot proceed under § 1983. Indeed, this case is even easier than *Balisok*, as Respondents here request injunctive relief mandating re-hearings, relief that far more directly affects the state sentencing decisions than the relief Balisok sought.

Second, the *Heck* bar is simply a broader statement of the rule from *Preiser*—that prisoners asserting claims that fall within the core of habeas must rely on the habeas statutes as their exclusive federal remedy. This rule recognizes that, where a claim falls within the literal text of both § 1983 and the habeas statutes, Congress intended the more specific language of the latter to supersede the broader provisions of the former. Respondents' claims here seek a new hearing at which they might obtain immediate or speedier release. As such, they fit comfortably within the traditional core of habeas. Accordingly, under *Heck*'s implementation of *Preiser*, Dotson and Johnson must use habeas, rather than § 1983, to pursue these claims.

Third, none of the Court's § 1983 precedents support the availability of § 1983 for claims such as these. At most, some cases addressed the merits of such claims under § 1983, but without examining whether that was an appropriate vehicle. The one § 1983 case to discuss the issue, *Wolff v. McDonnell*, 418 U.S. 539 (1974), properly understood, actually supports Petitioners, not Respondents. *Wolff* rejected the availability of § 1983 for claims, such as those here, that sought speedier release. And, to the extent that *Wolff* could be interpreted to support a broader scope for § 1983 that would cover Respondents' claims, that reading is foreclosed by the Court's later decisions in *Heck* and *Balisok*.

Finally, the straightforward reading of *Heck*, *Balisok*, and *Preiser* that we urge here is the only reading that is consistent with the comity concerns this Court has repeatedly

articulated as a motivating force in requiring prisoners to pursue habeas rather than § 1983. Channeling such cases to habeas would nudge the cases toward state court, where the state system may resolve them without drawing the federal judiciary into state parole decisions.

ARGUMENT

A. Under *Heck*, a prisoner may not use Section 1983 where, as here, a judgment in his favor would "necessarily imply the invalidity" of a state sentencing decision.

Simply put, *Heck* holds that a prisoner cannot use § 1983 to collaterally attack a state conviction or sentence, either directly or indirectly. That is, a prisoner cannot seek a federal judgment that *directly* overturns a state conviction—for example, an injunction vacating the conviction. And a prisoner cannot seek a federal judgment that *indirectly* does so—for example, a federal declaration that "the state conviction is sufficiently erroneous that we would have overturned it if only plaintiff had asked." *Heck* forbids either form of collateral attack, direct or indirect.[7] In *Heck*'s terms, if the federal judgment would "necessarily imply the invalidity" of the state conviction or sentence, it is irrelevant that the prisoner does not ask the federal court to deliver the ultimate *coup de grâce*. 512 U.S. at 487.

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[7] Some members of the Court have suggested that *Heck* will bar such claims only if another condition is also met—namely, that habeas corpus is available as a vehicle to raise the claim. See *Muhammad v. Close*, 124 S. Ct. 1303, 1305 n.2 (2004), citing *Spencer v. Kemna*, 523 U.S. 1, 21-22 (1997) (Ginsburg, J., concurring). As in *Muhammad*, "[t]his case is no occasion to settle the issue." 124 S. Ct. at 305 n.2. That is so because, even if a habeas requirement exists, it is plainly met. See pp. 34-36.

Respondents here seek to use § 1983 to attack a state sentencing decision. And the nature of their claims, as well as the relief they seek, shows that they are collaterally attacking that decision, both directly and indirectly. Accordingly, *Heck* bars them from using § 1983 to advance their claims.

1. Parole decisions like those Respondents challenge here are sentencing decisions.

The decisions under attack here—Parole Board decisions determining that the Respondents should serve specified periods of time in prison before again being considered for release—are sentencing decisions. Ohio law recognizes parole decisions as such, and this Court also understands parole in that manner.

Under Ohio law, sentencing authority is divided between the courts and the Adult Parole Authority ("APA"). After conviction, the courts set the minimum and maximum terms of any prison sentences. *Woods v. Telb*, 89 Ohio St. 3d 504, 511, 733 N.E. 2d 1103 (2000). "But . . . for as long as parole has existed in Ohio, the executive branch (the APA and its predecessors) has had absolute discretion over that portion of an offender's sentence" between those termini. *Id.* at 512. That approach is consistent with the law of most jurisdictions operating parole systems. "Indeterminate sentencing systems allocate sentencing discretion to the judge *and* the paroling authority." V. Palcios, *Go and Sin No More: Rationality in Release Decisions by Parole Boards*, 45 S.C.L. Rev. 567, 573, 574 (1994) (emphasis added). Thus, parole officials exercise sentencing discretion and make sentencing decisions.

Indeed, the Court has recognized as much. It has noted that the former federal sentencing system, which included a

parole component that was functionally indistinguishable from the system controlling Respondents' cases, was "a 'three-way sharing' of sentencing responsibility" where the legislature "defined the maximum, the judge imposed a sentence within the statutory range . . . and the Executive Branch's parole official eventually determined the actual duration of imprisonment." *Mistretta v. United States*, 488 U.S. 361, 364-365 (1988); see also *id.* at 365-366 and 390 ("[T]he sentencing function long has been a peculiarly shared responsibility among the Branches of Government."). More recently, in *Blakely v. Washington*, 72 U.S.L.W. 4546 (2004), the Court confirmed that parole boards exercise "sentencing discretion." *Id.* at 4550 ("a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion . . .").

These decisions do not lose their character as sentencing decisions just because administrative, rather than judicial, officials make them. Administrative officials also made the decisions at issue in *Balisok*. See *Balisok*, 520 U.S. at 643-45 (explaining administrative procedure regarding reduction of good-time credits). See also *Preiser*, 411 U.S. at 476, 491. There, as here, however, because the administrative decision affected the term of confinement, the Court easily concluded (1) that it counted as a "sentencing decision" for *Heck*'s purposes and (2) that *Heck* barred the use of § 1983 as a vehicle for challenging that decision. In short, it is the potential impact on the term of confinement (including the implied or declaratory impact, see below at 23-28), not the identity of the decision maker, that marks a sentencing decision.

The decisions in Ohio's parole process affect the term of confinement in two ways. The first way, of course, is that a favorable decision at a release hearing means an immediate release, thereby shortening the term of confinement.

Second, parole officials also make determinations, during parole release hearings and at halfway reviews, regarding the next possibility of release by the scheduling of later release hearings. These scheduling decisions reflect the exercise of sentencing discretion, and affect the duration of confinement, because a prisoner cannot obtain parole release except through a parole release hearing. Ohio Admin. Code § 5120:1-1-10(A), Supp. 5. Indeed, this defined impact on duration (*i.e.*, scheduling the next release hearing five years out means the prisoner will serve that time) makes these scheduling decisions even more like the sentencing decisions at issue in *Balisok* (which involved a set number of good-time days) than the release decision itself is. Accordingly, both types of decisions (*i.e.*, those granting or denying parole, and those scheduling future release hearings) constitute "sentencing decisions" for purposes of *Heck*'s bar.

Here, Respondents attack parole board decisions that are plainly sentencing decisions. Johnson attacks his April 9, 1999, parole release hearing, a hearing that denied him parole and set his next release hearing ten years away. That decision, of course, directly affected the duration of his confinement in both respects. It denied him what could have been an immediate release in 1999, and, by scheduling him for a 2009 hearing, it ensured that he will not achieve release before then.

Dotson's claims also seek, at least in part, to invalidate a sentencing decision. In particular, he attacks the parole officer's decision, at Dotson's 2000 halfway hearing, not to move up his currently scheduled 2005 release hearing. See Dotson Complaint ¶¶ 1-4, J.A. 17-19. That decision was an exercise of the officer's sentencing discretion, as he could have moved it up, which might have led to earlier release.

As with Johnson, in Dotson's case both aspects of earlier release were implicated—both the denial of immediate release and the fixed-time scheduling of the next opportunity for release. The scheduling aspect is obvious, as Dotson lost any chance of release between 2000 and 2005. The immediate-release denial is not as obvious, as a halfway review, unlike a full-fledged release-suitability hearing, does not technically allow for immediate release. However, a decision maker at a halfway review could schedule a full release hearing in the near-immediate future, *i.e.*, just a few weeks later, so the halfway hearing could lead to essentially an "immediate" release. Ohio Admin. Code § 5120:1-1-20(K) and (L), Supp. 8.

In sum, both Johnson and Dotson challenge sentencing decisions, and, as shown below, their challenges would imply the invalidity of the resulting sentences.

2. Equitable relief that vacates a parole decision and requires a rehearing necessarily implies the invalidity of the earlier decision, even if the relief would not automatically guarantee earlier release.

Heck's bar extends to all challenges that would, if successful, necessarily imply the invalidity of a sentencing decision. The court below erroneously concluded that "invalidation" would occur in the parole context only if success on the claim would "inevitably or automatically result in earlier release." See 329 F.3d at 471, Pet. App. 17a. That is, the court focused on the direct impact that success would have on the prisoner's confinement. This Court's precedent makes clear, however, that the proper focus is the impact of a federal judgment on the state decision itself. And

where success on the federal claim would require a State to ignore its previous decision and decide anew, that constitutes "invalidation."

a. "Invalidation" is measured by the implications for the state decision, not the prisoner's confinement.

Heck's holding does not make application of the favorable termination requirement contingent upon what would follow invalidation of the state decision. It simply addresses claims that "would render a conviction or sentence invalid," with no mention of the consequences of invalidity. 512 U.S. at 486. It therefore provides no textual support for the proposition that *Heck* is limited to claims where release (or any other particular result, for that matter) necessarily follows nullification of the state decision.

To the contrary, the language that *is* used in *Heck's* holding—the inquiry into whether the § 1983 claim would "render . . . invalid" or "invalidate" a state decision—indicates that the exclusive focus is on the nullification of the state decision itself, not on the later consequences. The leading dictionaries describe "invalid" as "not legally or officially acceptable," *Cambridge Advanced Learner's Dictionary* (2003); "not legally . . .valid," *American Heritage Dictionary of the English Language* (4th ed. 2000); and "void or without legal force," *Random House Dictionary of the English Language* (2d ed. 1987). Similarly, to "invalidate" is to "nullify." *Id.* None of those understandings go beyond the object nullified to describe its replacement. Given that, it is no surprise that this Court held that "the term 'invalidate' ordinarily means to render ineffective, *generally without providing a replacement rule or law*." *Humana, Inc. v. Forsyth*, 525 U.S. 299, 307 (1999) (emphasis added).

The decision below simply cannot be squared with that understanding of invalidity. This Court looks solely to the import of the potential federal judgment for the state decision. But the Sixth Circuit ignored the undisputed fact that success on Respondents' claims would necessarily imply that their prior parole decisions were nullities. And while *Heck* takes no notice of what follows invalidation, that was the sole focus of the lower court's determination. It plainly erred.

b. A complaint need not expressly seek the nullification of the state decision to imply the invalidity of that decision.

Balisok further teaches the irrelevance of the precise relief a prisoner seeks. It shows that *Heck* looks past the prayer for relief to consider what success on the merits in the federal action would portend for the state decision, even if the prisoner does not expressly ask the federal court to nullify that decision.

In *Balisok*, a prisoner sought to use § 1983 to challenge "the validity of the procedures used to deprive him of good-time credits." *Balisok*, 520 U.S. at 643-644. He did not ask for the credits to be restored, nor did he even ask for a new hearing to reconsider the deprivation; rather, he asked only for (1) a declaration as to the invalidity of the procedures, and (2) damages for "depriving him of good-time credits *without due process*, not for depriving him of good-time credits *undeservedly* as a substantive matter." *Id.* at 645 (emphases in original). The appeals court distinguished *Heck* on the idea that *Balisok* challenged merely the procedures employed, not the result of the hearing. *Id.* This Court, however, rejected that notion.

Amplifying *Heck*, in which the prisoner also avoided a direct challenge to the state decision, 512 U.S. at 479, the *Balisok* Court explained that the nature of the relief sought in a given case would not remove a claim from *Heck's* bar. Rather, the question was whether the nature of a prisoner's *claim* was such that any affirmation of the claim would imply that a state conviction or sentence was invalid. 520 U.S. at 645. That is, it did not matter whether the prisoner sought damages or even just a declaratory judgment; if a successful claim would amount to a federal declaration that the state decision was so error-ridden that it was the *type* that should not be allowed to stand, the claim was barred in § 1983. The *Balisok* Court concluded that the claims advanced there—the denial of an opportunity to present a defense, and a biased and deceitful decision maker—if successful, would mean that the state decision was per se invalid. *Id.* at 647-48. Thus, the claims were barred as implying invalidity, and the prisoner could not get around this bar merely by choosing a form of relief that would leave the targeted decision formally untouched.

The Sixth Circuit here did the opposite. Instead of focusing on whether the constitutional violations Respondents claimed would imply the parole decisions' invalidity, it looked only at the fact that the prisoners did not seek a 180-degree reversal (from denial to release). That exclusive focus on the relief sought cannot be reconciled with *Heck's* and *Balisok's* teachings on this point.

c. *Balisok* applied the *Heck* bar to claims that would entitle a prisoner only to a rehearing, not to a definite reversal of the first hearing's result.

Most importantly, the Court need not rely exclusively on dictionary definitions or *Heck's* and *Balisok's* instructions

about the insignificance of the relief sought to decide that these prisoner's claims will "invalidate" their parole decisions in spite of the fact that they seek rehearing instead of release. It has already held that a decision is "invalidated" not only when it is "reversed," but also when it is vacated for rehearing.

Balisok applied *Heck's* bar to a claim that would result in rehearing rather than outright reversal. The Court explained that the complaint made there, the alleged inability to present evidence, was the type that would entitle the prisoner to either reinstatement of the credits *or a new hearing*, saying that his impaired-defense claim "is an obvious procedural defect, and state and federal courts have reinstated good-time credits (*absent a new hearing*) when it is established." 520 U.S. at 647-48 (emphasis added). The "new hearing" option was further reinforced by the Court's citation, in support of its statement, to cases that forced States into the choice of reversing a decision's result or *giving a new hearing*. See *id.* So, for example, in *Kingsley v. Bureau of Prisons*, 937 F.2d 26, 27, 31 (2d Cir. 1991), a federal court had ordered a prison warden to reinstate a prisoner's good-time credits "unless a new hearing is held at which" the procedural defects were cured. And, in *Dumas v. State*, 654 So. 2d 48, 49 (Ala. Crim. App. 1994), another case that *Balisok* cited, the prisoner was "entitled to a new disciplinary hearing." Similarly, in *Mahers v. State*, 437 N.W.2d 565, 568-69, 570 (Iowa 1989), the court had ordered a rehearing while stressing that the new hearing might reach the same result. Turning from these precedents to *Balisok's* facts, the Court expressly noted that *Balisok* might well obtain the same results at a new hearing. 520 U.S. at 647-648. But that did not matter, and the Court nonetheless proceeded to apply the *Heck* bar to those claims.

Thus, *Balisok* shows that a federal decision necessarily implying the need for a new hearing falls within *Heck's* bar, even if it does not require a complete reversal of result at that new hearing. The decision below, which is premised on the fact that Respondents are entitled only to rehearing rather than reversal of their parole cases, cannot be squared with that and must yield.

d. Both the nature of Respondents' claims and the relief they seek demonstrate that their claims, if successful, would necessarily imply the invalidity of their previous parole decisions.

Applying the above principles to Respondents shows that their claims are *Heck*-barred. In particular, both the nature of their claims and the relief they request show that success on their claims would require the State to vacate the results of previous parole hearings and provide each of them with a prompt new hearing at which each might obtain parole. Accordingly, their claims, if successful, would "necessarily imply the invalidity of a state . . . sentence."

Johnson, for example, advances two types of claims challenging his 1999 release decision. First, he asserts an ex post facto claim predicated on the use of the 1998 Guidelines in making that release decision. Second, he advances a due process claim based on a variety of alleged procedural defects, including challenges to the panel's composition and to the hearing officer's alleged refusal to allow him to speak. Johnson Complaint, J.A. 42-53.

The State does not admit that either of these claims is valid or that Johnson will obtain success on them. But both are of the type that, if successful, would necessarily imply that the original decisions cannot stand. First, if Johnson can

establish an ex post facto claim, the State concedes that he would be entitled to a new parole hearing. See *Miller v. Florida*, 482 U.S. 423 (1987) (sentence imposed in violation of Ex Post Facto Clause requires resentencing). Second, while his due process claim may ultimately fail to state a claim,[8] his claim, if successful, would entitle Johnson to a new hearing. Indeed, to the extent that Johnson's challenge rests on the refusal to allow him to speak, his claimed error is virtually identical to the error this Court identified in *Balisok* as "necessarily implying the invalidity" of a state decision.[9] 520 U.S. at 647-648.

Further, any doubt on the "invalidation" question is resolved by looking to the relief Johnson seeks. While his complaint contains only a general request for "declaratory and injunctive relief," his Sixth Circuit briefing expressly demonstrates that the form of injunctive relief he seeks is an order requiring an immediate new parole hearing. See Opening Brief at 15 ("A new . . . parole hearing is the relief Johnson seeks."). But that relief would necessarily "imply the invalidity" of the decision from his previous hearing. Indeed, the requested relief is an even more direct attack on the state decision than the money damages requested as relief in *Heck* and *Balisok*. Having expressly sought relief vacating

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[8] There is no liberty interest in parole, a necessary predicate to a due process claim. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 15-16 (1979) (inmates with a liberty interest in parole must be given an opportunity to be heard).

[9] One key difference between this case and *Balisok* is that there the inmate did have a liberty interest in his good-time credits, which would support a due process claim. *Sandin v. Conner*, 515 U.S. 472, 487 (1995). In the parole context, by contrast, there is no liberty interest, and thus no due process claim. *Greenholtz, supra*. This difference, however, goes to the likelihood of *success* on the claim, and not to what would follow if the claim *were* successful. Thus, the *Heck* analysis is unaffected by questions of liberty interest.

the old decision and requiring a new one, Johnson cannot now contend that he does not seek to invalidate the previous decision.

Dotson's claims also seek, at least in part, to invalidate his sentencing decision. Like Johnson, he contends that the parole officer violated the Ex Post Facto Clause by relying on certain 1998 amendments to the parole regulations in reaching that decision. Dotson Complaint ¶¶ 1-4, J.A. 17-18. And, like Johnson, he requests as relief an "immediate new hearing." Moreover, as with Johnson, the State concedes that, if the officer violated the Ex Post Facto Clause, the previous sentencing decision cannot stand. See *Miller*, *supra*. Thus, as with Johnson, his ex post facto claims should be *Heck*-barred.

To the extent that he seeks purely declaratory relief regarding how future hearings are conducted, however, his claims are admittedly a somewhat closer call. The Court observed in *Balisok* that purely prospective relief "ordinarily" will not "necessarily imply . . . invalidity." 520 U.S. at 649. But that observation seemed driven more by the nature of the claim being discussed than the prospective or retrospective nature of the relief sought. That is, in that part of *Balisok*, the Court addressed a claimed error—that the Warden's alleged refusal to time-stamp documents violated due process—that was insufficiently egregious to "imply invalidity," because such an error simply would not undercut a resulting decision. Thus, such a claim would not be *Heck*-barred, even if a court ordered a warden to time-stamp in the future, because a statement about the need to time-stamp would not imply that past decisions were invalid.

The nature of Dotson's claim here is far different. It is difficult to conceive how a federal declaration that using the 1998 Guidelines at the 2005 hearing would violate the Ex

Post Facto Clause would not, in turn, imply that their use at the 2000 halfway review similarly violated the Ex Post Facto Clause. If so, however, the declaration regarding future use would necessarily imply the invalidity of the decision reached in the past. Under the reading of *Balisok* we urge, then, Dotson's claim is barred in its entirety. At most, though—even if *Balisok* is read to create a bright-line exception for forward-looking relief, an exception that is independent of the nature of the claim—Dotson can proceed only as to his declaratory-relief claim regarding the conduct of already-scheduled future hearings.

All other aspects of both Johnson's and Dotson's claims "necessarily imply the invalidity" of extant state sentencing decisions. Indeed, the parallels between this case and *Balisok* are striking. In both cases, the inmates claim that hearings regarding a sentence-shortening device were constitutionally flawed. In both cases the claims, if successful, would not guarantee that their sentences would be shortened, only that they would get new hearings. In both cases the new hearings could result in the same substantive outcome. The Court nonetheless held that the claims were *Heck*-barred. Respondents have no way around those dispositive facts—Respondents must overcome the *Heck* bar. They do not.

B. *Heck* incorporates and extends *Preiser's* rule, under which prisoners asserting claims, such as those here, that fall within the core of habeas must use habeas rather than Section 1983.

Examining the interplay between *Heck* and *Preiser v. Rodriquez*, 411 U.S. 475 (1973), further confirms that the *Heck* bar applies to Respondents' claims. One consistent theme that has animated this Court's harmonization of § 1983 and the habeas statutes since *Preiser* is this: § 1983

cannot be used to advance claims within the traditional reach of the more specific habeas statutes, because allowing that would eviscerate the habeas exhaustion requirement. *Heck* did nothing to undermine that rule—to the contrary, it extended it. Because the Respondents' claims are within the traditional scope of habeas, that rule bars them from using § 1983 to advance their claims here.

1. Where a prisoner's claim falls squarely within the traditional scope of habeas, habeas is the exclusive federal vehicle for advancing that claim.

Preiser was the first case considering the appropriate routing of claims that are textually cognizable under both the habeas statutes and § 1983. The Court recognized that "Congress has made the specific determination . . . that requiring the exhaustion of adequate state remedies," a necessary precondition of habeas relief when claims implicate state sentences, "will best serve the policies of federalism." *Preiser*, 411 U.S at 492, n.10. It also recognized that allowing state prisoners to press such claims under § 1983 "would wholly frustrate explicit congressional intent" because they "could evade [the habeas exhaustion] requirement by the simple expedient of putting a different label on their pleadings." *Id.* at 489-490. The Court therefore concluded that "Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the . . . length of their confinement, and that specific determination must override the general terms of § 1983." *Id. Preiser* determines whether a prisoner's claim falls within that region by examining the relief sought. If he seeks to expedite his release, his claim is within the exclusive control of habeas.

Further, a majority of the Court's members have recognized that *Heck* is similarly rooted in the need to protect the scope of habeas and its attendant exhaustion requirement.[10] See *Heck*. 512 U.S. at 491 (Thomas., J., concurring) ("Because the Court today limits the scope of § 1983 in a manner consistent both with the federalism concerns undergirding the explicit exhaustion requirement of the habeas statute . . . I join the Court's opinion."); *id.* at 499 n.4, 500, 503 (Souter, J. concurring, joined by Blackmun, Stevens and O'Connor, J.J.) ("[T]he proper resolution of this case . . . is to construe § 1983 in light of the habeas statute and its explicit policy of exhaustion."). See also *Spencer v. Kemna*, 523 U.S.1, 20 (1997) (Souter, J., concurring, joined by O'Connor, Ginsburg, and Breyer, J.J.) ("[T]he statutory scheme must be read as precluding such attacks . . . because [*Heck*] was a simple way to avoid collisions at the intersection of habeas and § 1983.) (citations and internal punctuation omitted), *id.* at 21 (Ginsburg, J., concurring), *id.* at 25, n.8 (Stevens, J., dissenting).

Any doubt on that point was removed when the unanimous Court recently observed that "conditioning the right to bring a § 1983 action on a favorable result in state litigation or federal habeas served the practical objective of preserving limitations on the availability of habeas remedies." *Muhammad*, 124 S. Ct. at 1304.

Although *Heck* reflects that policy, it goes further than *Preiser* in one important respect—it looks beyond the relief sought (the focus of *Preiser*) to examine a claim's indirect impact on a confinement decision (*i.e.*, a conviction or sentence). Claims are barred if they would necessarily remove the legal foundation for such a decision, even if the

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[10] To be sure, the *Heck* majority also explained the rule purely in § 1983 terms without regard to the availability of habeas.

claimant stops short of seeking immediate or speedier release. That is made plain by *Heck* itself, which barred a claim "clearly not covered by the holding of *Preiser*." 512 U.S. at 481. *Nelson* also recognized that the *Heck* doctrine is more protective of the habeas statutes than *Preiser*, stating that *Heck* even bars claims "at the margins of habeas," *Nelson v. Campbell*, 124 S. Ct. 2117, 2124 (2004) (per curiam), an area beyond the "core" territory that *Preiser* protects.

In sum, the *Heck* doctrine is simply an extension of the policy recognized in *Preiser*. Under *Preiser*, prisoners must use habeas, despite the textual applicability of § 1983, to advance those claims that fit within the traditional scope of habeas. Because Respondents' claims fit within that scope (as shown below), they are necessarily within *Heck*'s protective zone (which extends to the "margins of habeas"). Thus, the claims here are *Heck*-barred.

2. Respondents' claims lie at the core of habeas, as each seeks an immediate new hearing, which will provide a chance for immediate release.

Two lines of precedent, those concerning challenges to criminal sentences and those concerning indistinguishable claims about the parole process, show that Respondents' claims fall within the traditional scope of habeas.

a. This Court has consistently held that claims challenging criminal sentences are properly adjudicated in habeas. That is so not just because of the nature of the claim, but because the prisoner advances his claim in order to affect the duration of his sentence (*i.e.*, to obtain release, or earlier release, from custody), or to somehow revise the sentence originally imposed. Thus, habeas is used to challenge the imposition of a death sentence, because an inmate there seeks

to prevent the carrying-out of that sentence. The Court has likewise held that the habeas statutes control attacks on the severity of non-capital sentences, *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Lackawanna County District Attorney v. Coss*, 532 U.S. 394 (2001), and has ordered habeas relief for other federally recognized defects in sentences. *In re Bonner*, 151 U.S. 242 (1894); *Humphrey v. Cady*, 405 U.S. 504 (1972). In all of these cases, the relief sought was a cancellation or adjustment of sentence, or a chance at resentencing. In short, habeas governs all claims that seek to revise an ongoing or future sentence.

Presier was a particular application of that general principle, as it reinforced the rule that a claim falls within the scope of the habeas statutes if it challenges continued confinement. 411 U.S. at 489. Respondents' claims therefore sound in habeas if they seek, as a prospective matter, to alter the actual time served in confinement, using a federal court order as a tool.

That forbidden relief is what Respondents seek. They asked federal courts to set aside their extant parole decisions. As noted above, those are sentencing decisions. See above at 20-23. See also *Woods*, 89 Ohio St. 3d at 511. Respondents cannot be released without new parole hearings, and those decisions precluded new hearings for ten years. Respondents' claims that those decisions are constitutionally tainted are therefore a direct attack on the duration of their confinement under *Presier* and lie at the very heart of habeas.

b. The weight of precedent considering similar claims also demonstrates that such claims are typically brought in habeas. This Court's cases, which represent only the tip of the judicial iceberg, have included a steady complement of cases in which prisoners used the habeas statutes to press claims challenging various aspects of the parole release

process. *California Dept. of Corrections v. Morales*, 514 U.S. 499, 504 (1995); *United States Dept. of Justice v. Julian*, 486 U.S. 1, 7 n. 5 (1988); *Jago v. Van Curan*, 454 U.S. 14, 16 (1981); *United States Parole Commission v. Geraghty*, 445 U.S. 388, 393 (1980); *Warden v. Marrero*, 417 U.S. 653, 655 (1974); *Conway v. California Adult Parole Authority*, 396 U.S. 107 (1969). While those cases admittedly did not address the question of whether the underlying claims were properly brought in habeas, the consistent pattern of such claims being brought under the habeas statutes reflects an understanding that they are within the traditional scope of those statutes.

Further evidence of that understanding comes from the solid body of lower court precedent squarely ratifying the cognizablity of parole-release claims under the habeas statutes. Although there is some uncertainty about whether such claims should be brought under 28 U.S.C. §§ 2241 or 2254, the circuits agree that claims challenging parole release procedures can be brought under one or the other of those statutes. *Coady v. Vaughn*, 251 F.3d 480, 484 (3d Cir. 2001); *Crouch v. Norris*, 251 F.3d 720, 723 (8th Cir. 2001); *Thomas v. Crosby*, 317 F.3d 782 (11th Cir. 2004). Indeed, the courts have held that the same sort of ex post facto and due process claims made here can be brought under the habeas statutes. *Coady*, 251 F.3d at 488 (ex post facto claim based on application of new parole standards); *Thomas*, 371 F.3d at 790. (Tjoflat, J., concurring) (ex post facto claim based on changes in frequency of parole hearings and due process claim based on consideration of false evidence).

In sum, several factors point to the conclusion that Respondents' claims are squarely within the mainstream of habeas corpus. Consequently, the policy running from *Preiser* through *Heck* and beyond bars their prosecution under § 1983.

3. That Respondents' claims will not necessarily result in earlier release does not take them outside the traditional scope of habeas.

The mere fact that success on a prisoner's claims will not *guarantee* earlier release does not remove the claims from the scope of habeas. The history of the habeas statutes, this Court's application of those statutes, and the realities of habeas practice all strongly support the proposition that such claims are well within the traditional scope of the habeas.

a. The history of the habeas statutes provides two strong signals that Congress did not limit habeas to claims whose success would inevitably result in earlier release. To be sure, the original habeas statutes applicable to state prisoners authorized relief only if the petitioner could prove that "he or she [should] *forthwith be discharged* and set at liberty." Habeas Corpus Act of February 5, 1867, 14 Stat. 385 (emphasis added). Congress later removed that restriction, however, authorizing habeas courts "to dispose of the party as law and justice require," Rev. Stat. § 761 (1874), an authorization that, as discussed below, has been carried forward to this day. The intent of that change is clear: Congress abandoned any requirement that habeas claims must, if successful, result in outright release.

The second signal shows that Congress has ratified the processing of precisely the sort of claims pressed here—those resulting in rehearings likely yielding the same substantive outcomes—through habeas corpus. About a century ago, several early habeas cases involved violations that could be cured by new proceedings almost certainly resulting in the same substantive outcome. *In Re Medley*, 134 U.S. 160 (1890); *In re Bonner*, 151 U.S. 242 (1894); *Mahler v. Eby*, 264 U.S. 32 (1924). In each case, the Court sustained the

claims but relied upon the language of former § 761, discussed above, to order curative proceedings rather than outright release. *In re Medley*, 134 U.S. at 173-174; *In re Bonner*, 151 U.S. at 261; *Mahler*, 264 U.S. at 45-46. Congress has reenacted that language without material change, and it is now codified in the last paragraph of the present 28 U.S.C. § 2243. *Peyton v. Rowe*, 391 U.S. 54, 66-67 (1968) (discussing legislative history). Congress "is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580 (1978). It has therefore ratified the proposition that claims resulting in rehearing can be brought through habeas.

b. Two of this Court's decisions, *Peyton v. Rowe* and *Garlotte v. Fordice*, 515 U.S. 39 (1995), also establish that Respondents' claims are not removed from habeas merely because they will not result in outright release. In both cases, inmates brought habeas cases intended to expedite parole eligibility under systems, like Ohio's, where parole was completely discretionary. *Garrett v. Commonwealth*, 14 Va. App. 154, 157, 415 S.E.2d 245, 247 (Va. App. 1992); *Vice v. State*, 679 So. 2d 205, 208 (Miss. 1996). In both cases, the prisoners, if successful, would have ended up where these Respondents seek to be: at the door of the hearing room with no guarantee of what lies on the other side. In both cases, the State argued that the claims did not sufficiently implicate their continued custody to be properly brought in habeas.

Peyton rejected the argument that the petition should be denied merely because the claims would not result in immediate release. The Court held that the habeas statutes do "not deny the federal courts power to fashion appropriate relief other than immediate release," noting that "[s]ince 1874, the habeas corpus statute has directed the courts to

determine the facts and dispose of the case summarily, 'as law and justice require.'" 391 U.S at 66-67. *Garlotte* likewise concluded that the claim's potential impact upon parole was sufficient to bring it within the core of habeas corpus even if it did not directly affect the prisoner's actual confinement. "Invalidation of Garlotte's marijuana conviction would advance the date of his *eligibility* for release from present incarceration. Garlotte's challenge, which will shorten his term of incarceration if he proves unconstitutionality, *implicates the core purpose of habeas review*." 515 U.S. at 47 (emphasis added). *Peyton* and *Garlotte* show that a claim does not have to guarantee release to be within the core of habeas; it need only move the prisoner closer to the exit door.

c. The realities of habeas practice also prove that Respondents' claims fall squarely within the habeas statutes. Seeking rehearing rather than release, as Respondents do here, is perfectly consistent with habeas practice—a rehearing is what happens in the overwhelming percentage of successful habeas cases. "It should be borne in mind that the typical order of the District Court in such circumstances is a conditional release, permitting the State to rearrest and retry the petitioner without actually discharging him from custody." *Fay v. Noia*, 372 U.S. 391, 440 n.45 (1963). Thus, because almost all habeas cases result in retrial, not release, Respondents' efforts to obtain rehearing supports, rather than undermines, the conclusion that their claims are within the traditional scope of habeas corpus.[11]

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[11] Also, a habeas petition challenging a parole-related decision will not be barred as a second or successive petition, even if a prisoner has already filed a habeas petition attacking his conviction. That is because a parole-related petition challenges custody, not conviction, and because later-arising parole issues could not have been raised in an initial habeas petition challenging a conviction. See *Hill v. Alaska*, 297 F.3d 895, 898 (9th Cir. 2002); *Crouch v. Norris*, 251 F.3d 720, 724 (8th Cir. 2001).

C. Respondents are not helped by the Court's cases involving the use of § 1983 in parole or good-time contexts.

Petitioners recognize that, at first glance, some of the Court's precedents might seem to support Respondents, as some cases have involved the use of § 1983 in challenges to procedures involving parole or good-time credits. Indeed, the court below, as well as Respondents (at the certiorari stage), have relied on cases such as *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979); *Board of Pardons v. Allen*, 482 U.S. 369 (1987); and *Garner v. Jones*, 529 U.S. 244 (2000). *Wolff* allowed inmates to use § 1983 to press claims about the process for revoking good-time credits. *Greenholtz* and *Allen* and *Garner* were § 1983 cases contesting parole-release procedures. Closer examination reveals that those cases are inapposite.

First, the latter trilogy of cases—*Greenholtz*, *Allen* and *Garner*—do not establish that § 1983 was *properly* an available remedy in those cases, as the Court never addressed the issue in any of those decisions. In all three cases, plaintiffs used § 1983 to press claims similar to those here, but the Court simply addressed those claims on the merits. Apparently, no one challenged whether § 1983 was an appropriate vehicle in those cases, so the Court had nothing before it but the merits issues. Thus, the "most that can be said is that the point was in the case if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

Wolff, meanwhile, did address the use § 1983 for parole-related claims, but it is distinguishable for other

reasons. *Wolff* came after *Preiser*, but before *Heck*. Thus, the Court's focus in *Wolff*, under the *Preiser* approach, was on whether the *Wolff* claims fell in the "core of habeas" by seeking speedier release. 418 U.S. at 554. As the Court explained, the *Wolff* plaintiffs challenged the procedures that New York had established for revoking good-time credits, claiming that the procedures violated due process. Those plaintiffs sought, as relief, (1) restoration of any good time credits already revoked, (2) prospective injunctive relief ensuring that future hearings would use valid procedures, and (3) damages associated with the previous deprivation of due process. *Id.* at 553.

Applying the *Preiser* rule, which looked only at whether "speedier release" was the relief sought, the Court in *Wolff* separately analyzed each of the above three types of relief, with differing results. That tripartite division demonstrates how *Wolff*, properly understood, supports Petitioner in part, while any part of *Wolff* that might have helped Respondents has been supplanted by *Heck* and *Balisok*.

First, the *Wolff* Court easily found that the restoration of good-time credits was foreclosed under *Preiser*. *Id.* at 554. That part of *Preiser*/*Wolff*—barring injunctions aimed at speedier release—remains good law today. And, as explained above (at 31-34), that rule stands in Respondents' way, barring their claims to the extent that they seek a new hearing as a means to perhaps achieve earlier release.

Second, the *Wolff* Court allowed the inmates there to pursue *purely prospective* relief, aimed at forcing the prison officials to use different procedures in the future. 411 U.S. at 555 (*Preiser* did not bar relief "enjoining prospective enforcement of invalid [] regulations."). That part of *Wolff* also remains good law: not only was it left undisturbed in

Heck, but it was also expressly reaffirmed in *Balisok*. So long as nature of the prospective relief does not "'necessarily imply' the invalidity of a previous" state decision, it can go forward. 520 U.S. at 648 (remanding for determination whether particular prospective relief sought would necessarily imply the invalidity of any past decision).

Third, the *Wolff* Court allowed a claim for damages to proceed, but that part of *Wolff* was what the Court dramatically altered in *Heck* and *Balisok*. The *Wolff* Court took the narrowest possible reading of *Preiser*, saying that, "under that case, only an injunction restoring good time improperly taken is foreclosed." *Wolff*, 418 U.S. at 555. Thus, not only would a damages claim be allowed, but so, too, would a request for a "declaratory judgment as a predicate to a damages award." *Id.*

But as *Heck* and *Balisok* both explained, *Wolff* did not give blanket permission for all damages claims or all declaratory relief—and if *Wolff* did seem to do that, then any such implication was overruled in *Heck*. *Heck* involved a damages claim shorn of a demand for *any* injunctive relief, whether immediate release, or new trial, etc. *Heck*, 512 U.S. at 479. Not only did the Court bar that claim, but the Court specifically explained how *Wolff* was limited: *Wolff* allowed damages claims or declaratory claims *only if* those claims were for "using the wrong procedures, not the wrong result." *Heck*, 512 U.S. at 482-83. But, *Heck* explained, even attacks on wrong procedures would be barred if those "wrong procedures" were sufficiently erroneous that the resulting decision could not stand in light of them. Whether the "wrong procedures" rise to that level, however, turns upon

the *Heck/Balisok* analysis, and, as explained above, Respondents' claims are barred under that standard.[12]

The bottom line is that *Wolff* does not preserve some category of claims outside the *Heck/Balisok* realm; rather, *Wolff* was part of the evolution from *Preiser* to *Heck*, and its rules were refined by *Heck*. Thus, Respondents must clear *Heck* on its own terms to hurdle the *Heck* bar, and they cannot simply go around it by pointing to *Wolff*.

D. Petitioners' reading of *Heck* best protects the comity and federalism concerns that underlie *Preiser* and *Heck*.

Ohio admits that the rule we seek is not compelled by the literal text of § 1983, for, as the Court explained in *Preiser*, the broad language of § 1983 could encompass even cases that tread on the core of habeas, as in *Preiser* itself. This was also true in *Heck* and *Balisok*. But, as the Court has explained, concerns of comity and federalism often require that § 1983 not receive the full breadth that its language suggests. The Court has often limited § 1983 in two situations, and this case fits comfortably within both categories. First, the Court has stayed the federal hand when § 1983 litigation could disrupt a core state function. Second, the Court has restricted § 1983 when deferring federal litigation might avoid constitutional adjudication by giving the parties—and state courts—a chance to resolve their dispute on state law grounds.

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[12] Moreover, *Wolff's* preservation of damages claims would not help Respondents, as neither seeks damages. At most, they could seek refuge in *Wolff's* approving language about "declaratory judgment as a predicate," but such a declaratory claim can proceed only if it does not imply the invalidity of the parole decisions. And, in any event, Respondents cannot seek declaratory relief designed to secure speedier release, such as by necessarily implying the need for new hearings.

1. Applying *Heck* to parole release claims would limit federal intrusion into state sentencing matters.

The Court has recognized that the broad sweep of § 1983's text is limited by the need to preserve comity between the federal courts and the States when a claim under that statute implicates important state interests.

For example, the Court explained in *Stefanelli v. Minard*, 342 U.S. 117 (1951), that the "Court's lodestar of adjudication has been that [§ 1983] should be construed so as to respect the proper balance between the States and the federal government in law enforcement" and that the States' strong interest in enforcing their criminal law supersedes the "generality of language of the Civil Rights Act." *Id.* at 120, 121 (internal punctuation and citations omitted).

Preiser and its progeny fit within this broader pattern of deference to state concerns, for it "is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, or procedures, than administration of its prisons." See *Preiser*, 411 U.S. at 491. The state interest in prison management includes decisions regarding parole, which are as worthy of deference as the good-time credit decisions at issue in *Preiser*. "The parole-release decision . . . is . . . subtle and depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience." *Greenholtz*, 442 U.S at 9-10.

That intuitive process is by its very nature particularly susceptible to disruption, and inmates are likely to use § 1983 to try to influence it. Indeed, parole-related § 1983 cases are

already legion, as shown in part by the parole-related cases that have confounded the circuits in deciding when to apply the *Heck* bar. *Anyanwutaku v. Moore*, 151 F.3d 1053 (D.C. Cir. 1998); *Butterfield v. Bail*, 120 F.3d 1023 (9th Cir. 1997).

Thus, applying the *Heck* bar here will help to protect the states' parole systems from the effects of overly frequent § 1983 litigation. Lifting that burden would, in turn, allow parole bodies and prison officials to concentrate on the difficult work immediately before them.

2. Applying the *Heck* rule will foster resolution of parole disputes without federal constitutional adjudication, as state courts could resolve such claims.

In addition to avoiding interference with core state proceedings, the Court has also consistently sought to defer adjudication of § 1983 claims if there is a fair possibility that the underlying dispute can be resolved by state courts on state law grounds. See, *e.g.*, *Moore v. Sims*, 442 U.S. 415, 429-430 (1979); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10-12 (1987). Both practical and comity-based reasons support that approach, as it "offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests." *Moore*, 442 U.S at 429-430; *Pennzoil*, 481 U.S at 12 ("Thus, when this case was filed in federal court, it was entirely possible that the [state] courts would have resolved this case on state statutory or constitutional grounds, without reaching the federal constitutional questions Texaco raises in this case.").

Indeed, such federalism concerns have always been at the root of the *Preiser/Heck* line of cases. In those cases, the Court left no doubt that it did not seek to channel cases

toward habeas, rather than § 1983, simply to see such cases resolved in federal habeas. Rather, the main virtue of routing cases toward habeas is that habeas in turn channels disputes toward state forums whenever reasonably possible. See *Preiser*, 411 U.S. at 480-490; *Heck*, 512 U.S. at 498 (Souter, J., concurring). As the Court explained, § 1983 does not require state-court exhaustion; habeas does. Moreover, while the Prison Litigation Reform Act now requires prisoners to first seek administrative remedies, that exhaustion requirement does not require state *court* remedies to be exhausted, so it is not nearly as robust as the habeas exhaustion doctrine. *Muhammad*, 124 S. Ct. 1303, 1304 (2004) ("Prisoners suing under § 1983 . . . generally face a substantially lower gate [than in habeas], even with the requirement of the Prison Litigation Reform Act of 1995 that administrative opportunities be exhausted first.").

The link between habeas and state-court resolution is critical here, because parole claims can be more effectively resolved, or at least narrowed, if they are first vetted in state courts. Detailed administrative provisions control Ohio's parole procedure, and those rules have the potential to greatly influence, if not completely resolve, prisoners' parole claims. See Ohio Admin. Code Chapter 5120:01 (selected portions at J.A. 21-24; Supp 2-9). These administrative rules are further amplified by formal policies, and Ohio has adopted detailed parole guidelines that govern parole decisions. Thus, federal courts hearing parole-related § 1983 claims would need to navigate and interpret a complex body of state law, without the benefit of state-court guidance. By contrast, Ohio courts already have significant experience with Ohio's parole law. Applying *Heck*'s favorable termination requirement would put that experience to work.

Actual experience demonstrates the benefits of initially routing parole claims through the state courts. Ohio

prisoners challenged aspects of Ohio's parole guidelines in 2000, bringing both federal claims under § 1983 and state law claims in Ohio's courts. Those challenges implicated thousands of extant parole decisions and resulted in myriad § 1983 claims in federal courts. While those federal claims were pending, the propriety of the underlying practice was ultimately resolved on state law grounds by the Ohio Supreme Court. See *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St.3d 456, 780 N.E.2d 548 (2002). That mooted the related federal claims, *Michael v. Ghee*, Case No. 3:01CV7436 (N.D. Ohio March 24, 2003), but only after the federal court spent considerable time and effort on those claims, and only after Ohio's prison officials had been haled into federal court.

The record here indicates that similar non-federal resolutions might be possible in these cases. Respondents both allege federal ex post facto violations. Such claims, if meritorious, would also implicate the analogous anti-retroactivity provisions of § 28, Art. II, of Ohio's Constitution. Further, Respondent Johnson not only claims that the Petitioners deprived him of due process, but he also charges that prison officials violated several provisions of Ohio law in conducting his parole hearing. Although the merits of those claims are unclear, their state-law nature leaves no doubt that state law could resolve some of these claims without need for federal constitutional adjudication.

And as noted above, Ohio makes state-law remedies available for parole-related claims. Prisoners may use declaratory judgment as a "remedy to determine the constitutionality or constitutional application of the parole-guidelines," *Hattie v. Anderson*, 68 Ohio St.3d 232, 235, 626 N.E.2d 67 (1994), and Ohio's courts have also granted significant relief on state law grounds. *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St.3d 456, 780 N.E 2d 548 (2002).

Other States have likewise granted substantial relief to prisoners advancing parole release claims based on state law, *Trantino v. New Jersey State Parole Board*, 764 A.2d 940 (N.J. 2001); *Sage v. Gamble*, 929 P.2d 822 (Mont. 1996); *State ex rel. Shields, v. Purkett*, 878 S.W.2d 42 (Mo. 1994), and federal constitutional theories, *New Jersey Parole Board v. Byrne*, 460 A.2d 103 (N.J. 1983); *Trasker v. Mohn*, 267 S.E.2d 183 (W. Va. 1980); *In re Sinka*, 599 P.2d 1275 (Wash. 1979).

If the Court directs claims like those here to habeas, States will be able to use those state-court procedures. But if such claims proceed in § 1983, that opportunity is lost, and federal judges around the country will sit as state parole boards. That is not the law, nor should it be.

CONCLUSION

For the above reasons, the judgments below should be reversed.

Respectfully submitted,

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SUPPLEMENT

Ohio Rev. Code Ann. § 2967.03 (Anderson 1994)

The adult parole authority may exercise its functions and duties in relation to the . . . parole of a prisoner eligible for parole, upon the initiative of the head of the institution wherein the prisoner is confined, or upon its own initiative.

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The authority may . . . grant a parole to any prisoner, if in its judgment there is reasonable ground to believe that . . . such action would further the interests of justice and be consistent with the welfare and security of society.

Ohio Rev. Code Ann. § 2967.12 (Anderson 1994)

(A) Except as provided in division (F) of this section, at least three weeks before the adult parole authority . . . grants any parole, notice of the . . . parole, setting forth the name of the person on whose behalf it is made, the crime of which he was convicted, the time of conviction, and the term of sentence, shall be sent to the prosecuting attorney and the judge of the court of common pleas of the county in which the indictment against the convict was found. If there is more than one judge of that court of common pleas, the notice shall be sent to the presiding judge of the court.

(B) If a request for notification has been made . . . the adult parole authority also shall send a notice to the victim . . . prior to . . . granting any parole to, the person. The notice shall be provided at the same time as the notice required by division (A) of this section and shall contain the information required to be set forth in that notice. The notice also shall inform the victim or the victim's representative that

he may send a written statement relative to the victimization and the pending action to the adult parole authority and that any statement received by the adult parole authority prior to . . . granting a parole will be considered by the authority before . . . a parole is granted.

Ohio Rev. Code Ann. § 2967.13 (Anderson 1994)

(A) A prisoner serving a sentence of imprisonment for a felony for which an indefinite term of imprisonment is imposed becomes eligible for parole at the expiration of his minimum term, diminished [certain credits].

(B) A prisoner serving a sentence of imprisonment for life for the offense of first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, becomes eligible for parole after serving a term of fifteen full years.

Ohio Admin. Code § 5120:1-1-07 (1997)

(A) An inmate may be released on or about the date of his eligibility for release, unless the parole board, acting pursuant to rule 5120:1-1-10 of the Administrative Code, determines that he should not be released on such date for one or more of the following reasons:

(1) There is substantial reason to believe that the inmate will engage in further criminal conduct, or that the inmate will not conform to such conditions of release as may be established under rule 5120:1-1-12 of the Administrative Code;

(2) There is substantial reason to believe that due to the serious nature of the crime, the release of the inmate into society would create undue risk to public safety, or that due

to the serious nature of the crime, the release of the inmate would not further the interest of justice nor be consistent with the welfare and security of society;

(3) There is substantial reason to believe that due to serious infractions of division level 5120:1 of the Administrative Code, the release of the inmate would not act as a deterrent to the inmate or to other institutionalized inmates from violating institutional rules and regulations;

(4) There is need for additional information upon which to make a release decision.

(B) In considering the factors specified in paragraph (C) of this rule, the parole board shall consider the following:

(1) Any reports prepared by any institutional staff member relating to the inmate's personality, social history, and adjustment to institutional programs and assignments;

(2) Any official report of the inmate's prior criminal record, including a report or record of earlier probation or parole;

(3) Any presentence or postsentence report;

(4) Any recommendations regarding the inmate's release made at the time of sentencing or at any time thereafter by the sentencing judge, presiding judge, prosecuting attorney, or defense counsel;

(5) Any reports of physical, mental or psychiatric examination of the inmate;

(6) Such other relevant written information concerning the inmate as may be reasonably available, except that no document related to the filing of a grievance under rule 5120-9-31 of the Administrative Code shall be considered;

(7) Written or oral statements by the inmate, other than grievances filed under rule 5120-9-31 of the Administrative Code.

(C) In making any determination under paragraph (A) of this rule, the parole board may take into consideration any of the following factors:

(1) The inmate's ability and readiness to assume obligations and undertake responsibilities, as well as the inmate's own goals and needs;

(2) The inmate's family status, including whether his relatives display an interest in him or whether he has other close and constructive association in the community;

(3) The type of residence, neighborhood, or community in which the inmate plans to live;

(4) The inmate's employment history and his occupational skills;

(5) The inmate's vocational, educational, and other training;

(6) The adequacy of the inmate's plan or prospects on release;

(7) Any recommendations made by the sentencing courts;

(8) The inmate's conduct during his term of imprisonment;

(9) The inmate's behavior and attitude during any previous experience of probation, furlough, parole, or other administrative release and the recency of such experience;

(10) The availability of community resources to assist the inmate;

(11) The nature of the offense for which the inmate was convicted;

(12) The inmate's pattern of criminal or delinquent behavior prior to the current term of imprisonment;

(13) The physical and mental health of the inmate as they reflect upon the inmate's ability to perform his plan of release;

(14) The presence of outstanding detainers against the inmate;

(15) Any recommendations made by the staff of the department of rehabilitation and correction or any of its agencies;

(16) Any other factors which the board determines to be relevant, except for documents related to the filing of a grievance under rule 5120-9-31 of the Administrative Code.

Ohio Admin. Code § 5120:1-1-11 (1976)

(A) A hearing shall be held by the Parole Board prior to the release of an inmate in a state penal or reformatory institution pursuant to Administrative Regulation 5120:1-1-07.

Ohio Admin. Code § 5120:1-1-20 (1998)

(A) A prisoner who was denied release at a regular parole release hearing that occurred before April 1, 1998 and scheduled for his next parole hearing twenty months or more after the date of that hearing, will have his record reviewed for a possible earlier hearing after one year or half of the length of the continuance, whichever is later. For the purpose of this rule, a regular parole release hearing is a hearing conducted for the purpose of determining whether or not to release the prisoner on parole after he has served the time required by section 2967.13 of the Revised Code. A parole revocation hearing or a hearing by the parole board to consider a prisoner for shock parole, furlough or any other type of release is not a regular parole release hearing for the purpose of this rule and shall not establish a right to have the prisoner's file reviewed pursuant to this rule. A prisoner granted a projected release date or denied release at a parole hearing on or after April 1, 1998 shall not be reviewed pursuant to this rule.

(B) The review of the prisoner's case shall be conducted by a parole board hearing officer or other person designated by the chairman of the parole board. In conducting the review, the hearing officer shall consider information contained in the records maintained in central office, the institution master file, the institution unit file and any information submitted by the prisoner, in writing, for consideration.

(C) At least seven days before the review, the prisoner will be given a written notice that the review will occur and that he may submit a written statement and relevant documents for consideration during the review process. The notice shall advise the prisoner the approximate date that the review will occur and to whom he should submit documents

that he would like to have considered. The prisoner does not have the right to personally appear before the hearing officer.

(D) In conducting the review, the hearing officer shall review the details of the crime or crimes that led to the prisoner's current commitment, his prior criminal activity, problem areas that contributed to his criminal activity, involvement in available programs to address these problem areas, and institutional conduct. Ordinarily, the review will be confined to the prisoner's records and documents submitted by him for consideration. However, the officer may, at his discretion, request additional information or interview any person who might have information relevant to the inquiry.

(E) If the hearing officer determines that the prisoner has obeyed the rules of the institution and, since the time the parole board made its original decision, there have been changes in the prisoners circumstances of such significance that the parole board might want to reconsider the prisoner's case for possible early release, he may recommend the prisoner for an earlier appearance before the parole board.

(F) If the hearing officer finds that the prisoner has made some significant progress, but does not believe that it is of such magnitude that the release is warranted at this time, or if the hearing officer needs additional information in order to make a recommendation, he may recommend that a release hearing not be held at this time, but reschedule the case for another review prior to the date the prisoner will otherwise be considered for parole.

(G) If the hearing officer finds that since the date parole was denied the prisoner has committed any serious rule infraction, has been confined in local control or administrative control, or has not had changes in his

circumstances of such significance that the board might want to reconsider his case, he shall recommend that an early hearing not be held.

(H) The hearing officer shall submit, in writing to the chairman of the parole board, his recommendation, with reasons for it. If the hearing officer recommends that the prisoner have an early hearing, he shall state the basis of his conclusion that the prisoner has addressed the problem areas that led to his criminal activity or state the reasons that he believes circumstances have now changed to such an extent that the parole board might now conclude that the prisoner can now safely be released into the community. The hearing officer shall submit with his recommendation any written statement or documents submitted by the prisoner.

(I) The hearing officer shall prepare and have forwarded to the prisoner a written notice of his recommendation. The notice shall inform the prisoner of the reason for the recommendation and that he may submit to the chairman of the parole board, within three working days, his written objection to the hearing officer's recommendation.

(J) The chairman of the parole board, or person designated by the chairman, shall review the recommendation of the hearing officer, the materials provided by the prisoner to the hearing officer and any written objection to the hearing officer's recommendation. After the material has been reviewed, the chairman shall decide whether or not to schedule the prisoner for an early parole hearing.

(K) Within twenty eight days of the review, the prisoner shall be advised in writing of the decision of the chairman of the

parole board. If the decision is made to grant an early hearing, the notice will inform the prisoner of the month in which the hearing will be scheduled.

(L)If the chairman of the parole board decides to grant the prisoner an early hearing, he shall notify the record officer of the institution in which the prisoner is confined to schedule the prisoner for a hearing and to send the required notices to the judge, the prosecuting attorney, and if applicable the victim or victim's family.

ODRC Policy 501-36 (1994)

IV. DEFINITIONS

A. RELEASE CONSIDERATION HEARING: a hearing where a minimum of one Parole Board member and one hearing officer meet with the inmate, review and evaluate available information and decide whether to release the inmate to community supervision.

B. RELEASE CONSIDERATION INTERVIEW: a hearing officer meets with the inmate, reviews and evaluates available information and thereafter meets with a Parole Board member to decide upon a recommendation of a final decision regarding the inmate's possible release to community supervision.

C. FULL BOARD HEARING: a hearing which includes all available Parole Board members and which is preceded by a release consideration hearing or interview. The Board decides whether to release the inmate to community supervision.

D. MAXIMUM EXPIRATION DATE: the last day of a period of incarceration set by the court.

E. ELIGIBILITY DATE: a date set by law indicating when an inmate can be considered for release.

F. FIRST HEARING: the initial release consideration hearing set by law.

G. RULES INFRACTION: a violation of inmate rules of conduct established by the Department of Rehabilitation and Correction.

H. REVOCATION HEARING: a hearing conducted by Parole Board staff to determine whether a condition of release has been violated and, if a violation is found, to impose an appropriate sanction.

I. PAROLE BOARD MINUTES: the official public record of the decisions of the Ohio Parole Board.

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VI. PROCEDURE

A. PRE-HEARING PREPARATION

anticipation of Parole Board hearings, institutional record offices and/or unit management staff will:

1. Provide written notice to each inmate within 90 days of admission to an institution specifying the first legal eligibility date for a release hearing and maximum expiration of sentence;

2. During inmate orientation, provide a pamphlet and brief verbal explanation of the Ohio Parole Board Guidelines, the process to request a reconsideration of the decision by the

addition of new information, and the factors which are considered in a release decision by the Board (Administrative Rules 5120:1-1-08 and 5120:1-1-09). Interpreters should provide this information to non-English speaking and special needs offenders as well as advise them that an interpreter may assist them at hearings.

3. Notify each inmate, in writing, at least 14 days in advance of any scheduled hearing before the Ohio Parole Board.

B. HEARING PREPARATION

1. The Parole Board Chair schedules Parole Board members and hearing officers to conduct release consideration hearings or interviews based on the number of eligible inmates. These hearings or interviews should, to the extent administratively possible, be conducted sixty (60) days prior to the inmate's month of release eligibility.

2. At each institution where hearings are conducted, the Parole Board Chair designates, in advance, one Parole Board member to be responsible for assigning cases, determining which cases, if any, are subject to a release consideration interview and coordinating logistics with institution staff.

3. Prior to an initial release interview or hearing, the Parole Board hearing officer reviews the institution master and unit files, Central Office microfiche, information submitted by interested persons, and consults with unit management staff as needed. The information is consolidated by the hearing officer on the release candidate information sheet for each case. The sheet should contain the information listed in Appendix A with copies of the completed sheet placed in the Central Office microfiche file for use at any subsequent hearings or inquiries. The

information is updated prior to subsequent hearings concentrating on the release candidate's institution adjustment, programming, staff evaluations and release planning activities since the initial hearing.

C. HEARING/INTERVIEW PROCESS

1. All hearings are conducted in a setting which the Parole Board Chair or designee determines provides privacy, security, comfort, and a dignified atmosphere.

2. Attendance at hearings is limited to Parole Board staff, the inmate and an inmate's representative, such as an interpreter. Attorneys and witnesses are permitted only at revocation hearings. Unit management staff may provide input prior to the hearing.

3. Parole Board members and hearing officers shall not participate in any aspect of the decision making process when a conflict of interest exists in that case. The Parole Board Chair or designee should be informed of the employee's decision not to participate.

4. The process of consideration of an inmate for release may be initiated as a release consideration interview whereby the hearing officer interviews the inmate and reviews information maintained in the inmate's unit file and master file at the institution, the Central Office microfiche, and information provided by other interested parties. Each release decision hearing will be conducted with the hearing officer and the Parole Board member present unless the Parole Board Chair or designee, or Parole Board member determines that attendance by the inmate is appropriate or warranted.

5. Each release consideration interview or release consideration hearing with an inmate present will include a discussion or presentation to the inmate of the factual information upon which the decision is to be based. This information shall include, but is not limited to:

a. brief details of the committing offense;
b. the offender's role when codefendants are involved;
c. the offender's prior criminal record;
d. the offender's institutional record (disciplinary and rehabilitative); and,
e. the Parole Board Guidelines applicable to the inmate's case.

6. Each inmate is permitted to respond to the factual information provided at the hearing and submit any additional information either verbally or in writing, that the inmate feels is pertinent to the decision making process. The inmate's responses are noted on the release candidate evaluation sheet or information update sheet.

7. Confidential information shall not be released to the inmate, however inmates are informed if confidential information was considered. Confidential information includes:

a. Responses from judges, prosecutors, victims and victim representatives;
b. Information noted in official records as confidential or obtained under promise of anonymity;
c. The pre-sentence investigation and recommendation as directed by Section 2951.03 of the Ohio Revised Code;
d. Any information which could result in physical harm to any person or diagnostic opinions which, if disclosed, could seriously disrupt rehabilitative

programs, or any information deemed confidential by the hearing panel.

8. During the release consideration hearing or interview, the Parole Board hearing officer:

a. verifies the inmate's eligibility for release consideration;
b. interviews the inmate, notes the inmate's responses and prepares a recommendation for the designated Parole Board member, when appropriate;
c. provides advice and technical expertise regarding procedural issues; and,
d. records the major issues discussed and the final decision made at the hearing.

9. During the release consideration hearing or following a release consideration interview conducted by a hearing officer, the Parole Board member reviews the available information concerning the inmate's background, the Parole Board guideline applicable to the inmate's case and the hearing officer's recommendation to determine whether to recommend to the Parole Board the release of the inmate to the community. In a release consideration hearing every effort will be made to reach consensus between the hearing officer recommendation and the Parole Board member's determination. Where consensus cannot be reached the Parole Board member shall seek advice from other Board Members or Hearing Officers present prior to making the determination or refer the case for consideration by the Full Board.

D. DECISION MAKING

1. Prior to making any release or denial recommendation or decision, hearing officers and Parole Board members:

a. Will consider those factors specified in Administrative Regulation 5120:1-1-09;
b. May consider those factors specified in Administrative Regulation 5120:1-1-08; and,
c. Shall review and consider the inmate's Parole Board Guidelines;

2. The Parole Board will give special attention to certain offenders and to certain offense categories to ensure public safety and public confidence in the release process.

a. If a Parole Board member is considering recommending the release of an inmate who is serving a sentence for Aggravated Murder, Murder, Rape or Felonious Sexual Penetration or where the inmate's case is of high notoriety or in any case where the Parole Board members's recommendation is to deny release and continue further consideration of release beyond five years, the Parole Board member shall refer such inmate's case for a Full Board Hearing. This does not limit the discretion of a Parole Board member to refer any case to a Full Board Hearing.

b. In any case where the offense(s) for which the inmate has been committed to the institution resulted in serious physical harm to the victim or where the inmate's history or demeanor reflect that the inmate is chronically mentally ill, the inmate's record shall include a current mental health assessment (MHA) if release is being seriously considered. The MHA must be completed by a licensed for independent practice health care professional, e.g., psychologist,

psychiatrist, social worker, counselor, psychiatric nurse or chemical dependency counselor. For purposes of this procedure a current report is one written within the past two years. No recommendation or decision favorable to release shall be made until such current report is requested and made available for review.

c. Programs within the institutions which help inmates to identify problem areas, deficiencies, compulsions, or addictions and which provide inmates alternatives to negative behaviors are important. Inmates in denial or those refusing to participate in programs designed to reduce or alleviate further criminal behavior shall not be given favorable consideration for release if, in the opinion of the Parole Board Member(s) deciding their case, the inmate continues to present an unacceptable risk of violent and assaultive conduct.

3. The Parole Board should not accept the presence of a detainer as an automatic bar to parole, nor should the Board deny access for parole consideration to an offender who is a foreign national.

4. The decision will be provided to the inmate, both verbally and in writing on the Parole Board Action form immediately following the hearing. Written reasons must be given for decisions that are contrary to the Parole Board Guidelines. Decisions on hearings requiring further review should be made available within 21 calendar days.

5. When release is denied, the Parole Board will inform the inmate in writing of the month and year of his or her next release consideration as well as the reasons for denying release. Inmates denied release will be informed of the process for reconsideration.

6. Once a decision has been finalized, notification of the decision shall be provided to victims and/or victim representatives.

7. Parole Board minutes are considered public information once signed by a majority of Parole Board members.

ODRC Policy 501-38 (1994)

IV. DEFINITIONS

A. RECONSIDERATION: As used in this policy, "reconsideration" shall be the providing of information that was not known or considered by the Parole Board in a preceding hearing which the provider believes should be considered and that if considered could have an effect on the decision rendered.

B. OHIO PAROLE BOARD: The legally constituted authority established pursuant to Section 5149.10 of the Ohio Revised Code including the duly appointed or assigned Hearing Officers and support staff.

C. HEARING: Any release consideration for an eligible inmate's case conducted by a hearing panel or as an interview by a hearing officer with a recommended action forwarded to a Parole Board member for final determination.

D. RULE INFRACTION: A violation of the inmate rules of conduct established for the institutions.

E. SPECIAL CONDITIONS OF RELEASE: Rules of supervision additional to the standard conditions of release as established by the Ohio Parole Board or the Parole Supervision Section of the Adult Parole Authority.

F. PAROLE BOARD RISK ASSESSMENT/ AGGREGATE SCORE: A component of the Parole Board Guidelines system that evaluates an offender's potential risk to re-offend based upon documented historical items. Both the Risk Assessment and Guidelines are suggestive tools utilized by the Parole Board to enhance the quality of decisions. They do not mandate decisions and are not intended to create an expectation of release.

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VI. PROCEDURE

The Ohio Parole Board makes every effort to receive relevant information, concerns and personal opinions concerning each inmate's case prior to or during the hearing. Information is sought through statutory notification of release consideration hearings to judges, prosecutors and victims and the Parole Board's policies of hearing notification to inmates and making itself accessible to the public through personal interviews.

Regardless of these efforts, there are cases where relevant information is not known or available prior to a release decision being made or cases where the inmate's behavior subsequent to a release decision has direct bearing on the decision. In these cases, the Ohio Parole Board will accept the new information and process a reconsideration of the previously rendered decision.

A. A request for reconsideration of any release decision must be submitted in writing to the Ohio Parole Board within sixty (60) days of the date of the release consideration hearing. There is no specific form or format for this process.

B. The request for reconsideration must specify information that was either not available or not considered at the time of the hearing.

C. Upon receipt of a request for reconsideration, the Parole Board shall process the request and file material relating to the hearing and deliver this material to the Parole Board Chair or designee.

D. Inmates alleging an error in their Risk Assessment/Aggregate Score and subsequent guideline determination shall first discuss the suspected error with their Unit Manager or Case Manager. If the Unit Manager believes an error has been made, the circumstances are to be referred to the institution's Director of Social Services. If the Director of Social Services agrees that an error has been made, (s)he shall forward a letter or memorandum outlining the alleged error to the Chief Hearing Officer or the Parole Board. The Chief Hearing Officer or designee will make the final determination regarding the alleged error. If an error is found that does not affect the guideline utilized by the Parole Board, a corrected Risk Assessment will be forwarded to the inmate through the Director of Social Services. If an error is found affecting the guideline, the corrected Risk Assessment and a memorandum outlining the error(s) shall be forwarded to the Parole Board Chair for processing as a reconsideration pursuant to the subsequent sections of this policy.

E. The Parole Board Chair or designee shall determine whether or not the request for reconsideration provides information not known or considered at the hearing and whether the information, if considered, would affect the previous decision rendered.

F. If the determination is that the request for reconsideration is not well founded, the Parole Board staff

shall prepare a written response advising the provider that the request is denied and that the Parole Board's decision stands.

G. If the determination is that the request for reconsideration is well founded, the Parole Board Chair or designee shall initiate a modification sheet requesting:

1. The previous decision be modified to reflect an action commensurate with the request for reconsideration, or;

2. The previous decision be rescinded and recommend an alternative action, or;

3. The previous decision be rescinded and that the case be scheduled for rehearing.

The modification request as provided in paragraph G shall be submitted to all remaining Board Members for final approval. Final approval requires the concurrence of at least a majority of all Board Members. Failure to receive final approval negates the modification request and affirms the original decision.

In any case where the request for reconsideration involves the institution administrators advising the Parole Board of subsequent institution rule violations or in any case where the request information would clearly affect the previous decision rendered, the Parole Board Chair may direct a special minute to rescind the previous action and order a rehearing of the case. Such special minutes must be submitted to the remaining Parole Board Members for concurrence by at least a majority.

Inmates requesting reconsideration of an unfavorable release consideration decision based on disparate treatment

must provide names and institution numbers of inmates upon whose action the appeal is based.

K. Victims requesting reconsideration must provide the information to the Victim Notification Section or the Parole Board in writing or in person. The Parole Board Chair may direct a special minute to rescind the previous action and orde· a rehearing of the case. Such special minutes must be submitted to the remaining Parole Board Members for concurrence by at least a majority.

L. - In any case where the original release consideration is to release the offender and the request for reconsideration is filed timely. the Parole Board Chair or designee may stop the physical release of the inmate pending determination of the request by informing the institution record office. the Parole Supervision Placement Section and the inmate in writing.

Supreme Court, U.S.
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No. 03-287

In the Supreme Court of the United States

REGINALD A. WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, *et al.*,

Petitioners,

v.

WILLIAM DWIGHT DOTSON, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT WILLIAM DOTSON

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QUESTIONS PRESENTED

In *Heck* v. *Humphrey*, 512 U.S. 477, 487 (1994), the Court held that a state prisoner cannot advance a claim under 42 U.S.C. § 1983 that would "necessarily imply the invalidity of his conviction or sentence," unless and until he has first invalidated the underlying "conviction or sentence." The questions presented in this case with respect to respondent Dotson are:

1. Does *Heck* bar a prisoner's Section 1983 claims that challenge, on *ex post facto* grounds, the procedures and parole-eligibility standards that will be applied to him in future parole proceedings, and that seek only permanent injunctive and associated declaratory relief against state parole officials relating to the conduct of those future proceedings?

2. Does *Heck* bar a prisoner's Section 1983 claim that calls into question a non-binding recommendation of a parole officer, made to the Parole Board, concerning the future scheduling of a discretionary parole hearing, especially where subsequent events have deprived the recommendation of any continuing effect and thus mooted any challenge to the recommendation that might have been brought under 28 U.S.C. § 2254?

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STATEMENT

This case arises out of the efforts of two Ohio inmates to challenge, in civil rights actions under 42 U.S.C. § 1983, certain procedures used by the State in parole proceedings. Respondent William Dotson challenged, among other things, the Ohio Parole Board's anticipated use and retroactive application to him, in future parole proceedings, of certain new guidelines and procedures that would have the effect of rescinding his eligibility for parole and decreasing the frequency of parole hearings to which he would be entitled in the future. The district court dismissed Dotson's *ex post facto* claims for "prospective" relief (J.A. 10) as barred by *Heck* v. *Humphrey*, 512 U.S. 477 (1994), reasoning that success on those claims would "necessarily imply the invalidity" of his conviction or sentence. In reversing, all eleven members of the Sixth Circuit who sat on the three-judge and en banc panels agreed that *Heck* poses no barrier to Dotson's constitutional claims.

A. Factual Background To This Litigation

In 1981, Ohio convicted respondent Dotson of aggravated murder and sentenced him to life imprisonment.[1] Because Dotson's offense was committed before October 19, 1981, state law provided that he would "become[] eligible for parole after serving a term of fifteen full years." OHIO REV. CODE. ANN. § 2967.13(B) (Anderson 1994) (Pet. Br. S-2).[2] Thus, after 15 years had passed (including time spent in jail awaiting trial), Dotson's first parole hearing was held in April 1995. J.A. 16 (Cplt. ¶ 11). The purpose of such a so-called "release hearing" is to determine whether the prisoner is *suitable* for parole, that is, whether release "would further the interests of justice and be

---

[1] The background facts are drawn largely from Dotson's *pro se* complaint, which was dismissed under 28 U.S.C. § 1915(e). Pet. App. 47a-51a.

[2] This provision was repealed in 1996 as part of an overhaul of Ohio's sentencing and parole system. Petitioners concede, however, that Dotson's sentence continues "to be controlled by pre-1996 law." Pet. Br. 5 n.1.

consistent with the welfare and security of society." OHIO REV. CODE ANN. § 2967.03 (Anderson 1994) (Pet. Br. S-1).

To give more specific content to this general standard, the administrative regulations governing the Ohio Parole Board in place at the time of Dotson's offense (and in 1995) provided that an inmate *may* be released, unless the Board finds release inappropriate for one or more of the following reasons:

> (1) There is substantial reason to believe that the inmate will engage in further criminal conduct, or * * * will not conform to * * * conditions of release * * * ;
>
> (2) There is substantial reason to believe that due to the serious nature of the crime, the release * * * would create undue risk to public safety, or * * * would not further the interest of justice nor be consistent with the welfare and security of society;
>
> (3) There is substantial reason to believe that due to serious infractions of Administrative Regulations, the release * * * would not act as a deterrent to the inmate or to other institutionalized inmates from violating institutional rules * * *;
>
> (4) There is a need for additional information upon which to make a release decision.

OHIO ADMIN. CODE § 5120:1-07(A) (1975) (J.A. 21); see Pet. Br. S-2 to S-3 (1997 version). Although the presence of one or more of these factors requires the denial of parole, their absence does not mean that parole must automatically be granted. In assessing a prisoner's suitability for parole, the Board retains significant discretion to refuse to release a prisoner based on considerations not enumerated in the regulations. See *Inmates of Orient Correctional Inst.* v. *Ohio State Adult Parole Auth.*, 929 F.2d 233, 235-36 (6th Cir. 1991); *Layne* v. *Ohio Adult Parole Auth.*, 780 N.E.2d 548, 555 (Ohio 2002).

At Dotson's initial release hearing in April 1995, the Parole Board decided against releasing him. J.A. 16 (Cplt. ¶ 11); Pet. App. 7a, 22a, 38a. The Board further found that, because of the

nature of Dotson's offense, a second release hearing would be deferred for ten years. J.A. 16 (Cplt. ¶ 12). Dotson's next release hearing was accordingly scheduled for June 2005. *Ibid.*[3]

Ohio's administrative regulations require that prisoners denied parole at a release hearing that occurred before April 1, 1998 (and whose next hearing is deferred for 20 months or more), are entitled to a "review" after half the length of the deferral period has expired. OHIO ADMIN. CODE § 5120:1-1-20(A) (1998) (Pet. Br. S-6). The sole purpose of this so-called "halfway review" is to determine whether the inmate should receive an earlier parole release hearing than the one originally scheduled. *Id.* § 5120:1-1-20(E) (Pet. Br. S-7). A favorable decision at the halfway review does *not* result in the prisoner's release from incarceration, or make it likelier that the inmate will succeed at his release hearing in obtaining parole.

Under the Ohio regulations, the halfway review proceeds in two steps. The first stage is conducted by a single "parole board hearing officer or other person designated by the chairman of the parole board." OHIO ADMIN. CODE § 5120:1-1-20(B) (Pet. Br. S-6). Based on a review of the inmate's file, any written submissions the inmate might make, and any further investigation the parole officer elects to undertake, the parole officer formulates a recommendation as to whether the next scheduled release hearing should be moved up and conveys that recommendation to the chairman of the Parole Board. *Id.*

---

[3] At the time of the 1995 hearing, Ohio regulations provided that, when a prisoner was denied parole, the Parole Board must schedule another hearing no "later than five years beyond the minimum eligibility date for release consideration, unless for good cause shown." OHIO ADMIN. CODE § 5120:1-1-10 (1979); see J.A. 14, 24 (Cplt. ¶ 5 & Exh. B). Moreover, "[i]f release is denied at such second hearing, the inmate *shall be eligible for annual hearings thereafter*." OHIO ADMIN. CODE § 5120:1-1-10 (1979) (emphasis added); see J.A. 14, 24 (Cplt. ¶ 5 & Exh. B). This provision was amended on March 16, 1998, to eliminate the right to annual hearings following a second denial of parole. See J.A. 14-15, 25 (Cplt. ¶ 7 & Exh. C). Under the current version of the regulation, the inmate's second and later release hearings may be scheduled up to ten years after the date of the denial of parole.

§ 5120:1-1-20(B)-(H) (Pet. Br. S-6 to S-8). At the second stage of the halfway review, the Parole Board chairman decides whether or not to accept the recommendation. *Id.* § 5120:1-1-20(J) (Pet. Br. S-8). Even if the parole officer recommends an earlier release hearing, it remains the prerogative of the Board to accept or deny that recommendation and schedule such a hearing as it sees fit. *Ibid.*

In accordance with these procedures, Dotson received the first stage of his halfway review on March 10, 2000. J.A. 16-17 (Cplt. ¶ 13). On March 1, 1998, however, the Parole Board had adopted new guidelines for making parole decisions. *Id.* at 14, 17, 27-28 (Cplt. ¶¶ 6, 14 & Exh. D). Those guidelines take the form of a two-dimensional grid that assigns numerical scores to both the severity of the inmate's offense and the likelihood of recidivism ("criminal history/risk" score). J.A. 27 (Cplt. Exh. D). At the intersection of these two numbers lies a range of months that the prisoner is expected to serve before becoming a candidate for parole. Although "the Parole Board may depart from the guidelines (either upward or downward)" (*ibid.*), in practice it "usually follows them." Pet. Br. 7.

At the first stage of Dotson's halfway review in 2000, the parole officer – retroactively applying the newly promulgated guidelines – assigned Dotson a range of 390 months to life. J.A. 17, 37 (Cplt. ¶ 15 & Exh. G); Pet. App. 7a. At that time, Dotson had served only 230 months; by the time of his scheduled release hearing in 2005, he would have served only 293 months. J.A. 37 (Cplt. Exh. G). Accordingly, after finding that Dotson's "continuance date remains short of the Guideline Range," the parole officer recommended that no earlier release hearing be scheduled. *Ibid.*

The record is silent as to the outcome of the second stage of Dotson's halfway review. In their brief, petitioners, citing Dotson's complaint, say that the parole officer's recommendation "was apparently accepted." Pet. Br. 12.

Acceptance of the parole hearing officer's recommendation by the Parole Board would mean (in the absence of intervening action by the Board) that Dotson would not come before the Board for a release hearing until June 2005. At that time, however, Dotson will still be 97 months short of his guideline-assigned parole *eligibility* date; if the guidelines are followed, therefore, the 2005 release hearing will be essentially symbolic, as Dotson will have no meaningful opportunity to have his *suitability* for parole evaluated by the Board.

B. The Proceedings In The District Court

1. Shortly after it became clear during the halfway review that the parole hearing officer had based his recommendation on the retroactive application of the 1998 guidelines, Dotson filed a *pro se* complaint in federal district court. See J.A. 10-20. Dotson claimed, among other things, that the retroactive application of those guidelines to him in future parole proceedings – and the postponement of his eligibility for parole until he had served 390 months in prison – would contravene both the *Ex Post Facto* Clause of Article I, Section 10 of the U.S. Constitution, and the Due Process Clause of the Fourteenth Amendment. J.A. 17-18.

According to the complaint, the Board's retroactive change in the parole standards and procedures, if used to determine Dotson's eligibility for parole, would work to his disadvantage in at least two ways. *First*, it would eliminate the possibility that he would be a candidate for release at his 2005 hearing. J.A. 17-19 (Cplt. ¶¶ 1-3). That result, Dotson contended, was inconsistent with an Ohio statute, in force at the time of the commission of the crime, providing that he would "become[] eligible for parole after serving a term of fifteen full years." OHIO REV. CODE. ANN. § 2967.13(B) (Anderson 1994).

Second, Dotson claimed that retroactive application of the March 16, 1998, regulations (see note 3, *supra*) would disadvantage him by "alter[ing] and cancel[ing] the period between parole reconsideration hearings." J.A. 19 (Cplt. ¶ 4). Specifical-

ly, he noted that the old regulations "mandated" that, following the denial of parole at a second release hearing, the Board would provide an inmate with "annual hearings thereafter"; in contrast, the 1998 regulations "authoriz[e] initial hearing continuances for *up to ten (10) years* with no chance of any second reconsideration hearing prior to the expiration of that time." J.A. 19 (Cplt. ¶ 4) (emphasis added). Thus, Dotson objected to the possibility that the new regulations would be applied to him after his second release hearing in 2005, with the result that he could be denied a third release hearing *for ten years* (in contrast to his right to *annual* hearings under the old regulations).

Dotson's complaint sought "prospective Declaratory And Injunctive Relief." J.A. 10; *id.* at 20. More specifically, he asked the court to "issue a binding statement declaring and explaining" his "due process rights" under the Ohio statutes and regulations in effect before the 1998 changes. J.A. 20 (Cplt. ¶ 1). He also requested a declaration regarding the "legal rights" and "duties" of "all parties" under the *Ex Post Facto* Clause. J.A. 20 (Cplt. ¶ 2). Finally, he requested "a permanent injunction" directing the defendant Ohio officials (petitioners in this Court) "to comply with the court's declarations" concerning Dotson's constitutional rights "and to proceed toward a prompt and immediate parole hearing in accordance with the statutory and administrative rules in place when [Dotson] committed his crimes." J.A. 20 (Cplt. ¶ 3).[4]

---

[4] Based on the complaint's request that a "permanent injunction" be issued against petitioners ordering them to "proceed toward" a parole hearing that is "prompt and immediate" (J.A. 20 (Cplt. ¶ 3)), petitioners suggest that Dotson was actually seeking an order *vacating* the parole officer's recommendation at the halfway review in 2000. But the complaint nowhere requests vacatur as a remedy and, as noted above, it expressly limits the relief sought to "*prospective* Declaratory And Injunctive Relief." J.A. 10 (emphasis added). Moreover, because the record is unclear whether, at the time the complaint was filed (May 12, 2000), the Parole Board had acted on the parole officer's March 10, 2000 recommendation (J.A. 37), it is possible to read Dotson's complaint as seeking merely to have the federal court enjoin the Parole Board *not to accept* the officer's negative recommendation. Petitioners, however, interpret Dotson's complaint as requesting that the hearing officer be required to redo the first stage of the halfway review and formulate a new recommendation. Although that interpretation is at best debatable, petitioners' entire argument rests upon it.

2. The district court dismissed Dotson's complaint *sua sponte* on the ground that his claims were barred by *Heck* v. *Humphrey*, 512 U.S. 477 (1994). See Pet. App. 47a-51a.

C. The Proceedings In The Court Of Appeals

Dotson took a *pro se* appeal to the Sixth Circuit. Petitioners elected not to submit a brief. See Pet. App. 40a.

On February 7, 2002, the Sixth Circuit sent the parties a notice indicating that the case had been submitted to a panel consisting of Judges Ryan, Boggs, and Cole, which would be sitting on April 25, 2002. Also on April 25, 2002, the Ohio Parole Board conducted another review of Dotson's parole status and issued a decision continuing his next parole release hearing until June 2005 and declining to schedule it earlier.[5]

1. A panel of the Sixth Circuit unanimously reversed the district court's dismissal order. Pet. App. 36a-46a. Writing for the court, Judge Ryan concluded that the district court had "fail[ed] to appreciate the nature of Dotson's challenge." *Id.* at 43a. Because Dotson was "not challenging the denial or revocation of parole," the court reasoned, but instead merely whether "the Parole Board properly revoked his *eligibility* for parole, his claim was not barred by *Heck*." Pet. App. 43a-44a (emphasis in original). Under *Heck*, Judge Ryan explained, "only prisoner challenges that 'necessarily imply' the invalidity of the conviction or challenge the duration of the physical imprisonment are not cognizable." Pet. App. 42a. Since that did not include "a prisoner's § 1983 challenge to the procedures employed in *parole eligibility* determinations," the district court's order of dismissal was mistaken. *Id.* at 43a.

---

[5] A copy of the April 25, 2002, Parole Board decision, which came to counsel's attention during the preparation of this brief, is not in the record of this case. Because this document bears on the question of mootness, however, we have reproduced it in an appendix to this brief. See App., *infra*, 1a-4a.

Judge Cole concurred, emphasizing that Dotson was challenging "only the *scheduling* of his release hearing" and not any "release decision." Pet. App. 46a (emphasis added). Because neither potential outcome of the scheduling decision – "resecheduling the hearing or not rescheduling the hearing – necessarily implies the invalidity of [Dotson's] continued confinement," Judge Cole explained, Dotson's Section 1983 action should have been allowed to proceed. *Ibid.*

2. The court of appeals *sua sponte* reheard Dotson's appeal en banc, together with the appeals of respondent Rogerico Johnson and another prisoner whose case presented similar issues. J.A. 5-6; Pet. Br. 15. As to Dotson's claims, the en banc court unanimously reached the same conclusion as the panel and reversed the district court's judgment. Pet. App. 4a-35a.

Chief Judge Martin's majority opinion (for six judges) conducted an extensive review of this Court's decisions involving the intersection of habeas corpus and prisoner Section 1983 claims, as well as of the circuit decisions involving the application of *Heck* v. *Humphrey* to challenges to the procedures used in parole proceedings. Pet. App. 8a-16a. On the basis of that review, the court announced the following rule (*id.* at 19a-20a):

> where a prisoner does not claim immediate entitlement to parole or seek a shorter sentence but instead lodges a challenge to the procedures used during the parole process as generally improper or improper as applied in his case, and that challenge will at best result in a new discretionary hearing the outcome of which cannot be predicted, we hold such a challenge cognizable under section 1983.

Applying that principle, the court held that both Dotson's and Johnson's Section 1983 claims could proceed under *Heck*. The court of appeals first noted that Dotson's complaint did not challenge "the denial of parole" itself; instead, it challenged "the parole hearing" conducted in 2000, at which the parole officer "made a determination about Dotson's parole eligibility, not about his parole suitability." Pet. App. 7a. "Although

Dotson challenges a parole eligibility determination and Johnson a parole release determination," the court reasoned, "the success of either challenge would result" only in "a new hearing that would follow the appropriate procedures under Ohio law." Pet. App. 17a. Moreover, because parole is entirely discretionary in Ohio, "the impact the new hearings would have on Dotson and Johnson's parole or release is indeterminate." *Ibid.* Accordingly, the court concluded, "we cannot say that a successful section 1983 action that simply results in a new discretionary parole hearing 'necessarily implies' the invalidity of either plaintiff's conviction or sentence." *Ibid.*

Judge Gilman, joined by three judges, concurred in part and dissented in part. Pet. App. 20a-35a. Judge Gilman *agreed* with the majority that Dotson had stated a valid claim under Section 1983 that was not barred by *Heck*, making the resolution of Dotson's claim unanimous. Judge Gilman's disagreement with the majority was limited solely to the disposition of Johnson's case. According to Judge Gilman, the critical issue under *Heck* and later cases is not whether a Section 1983 claim, if successful, "will necessarily shorten a prisoner's time in jail" but rather whether it will "imply the invalidity of any state criminal judgments" – including the decisions of state administrative bodies such as parole boards – "relating to the length of a prisoner's incarceration." Pet. App. 21a, 23a.

Because Johnson was seeking to have "redone" a Parole Board hearing at which he was denied parole, Judge Gilman explained, his claim was barred by *Heck* under this rule. Pet. App. 33a. In contrast, "[t]he nature of Dotson's claim – an attack on the retroactive applicability of Ohio's statutory parole-eligibility scheme – does not necessarily imply the invalidity of any judgment by an administrative body that he is or is not entitled to parole." *Id.* at 28a. That is because in Dotson's case a "successful outcome would simply dictate that the 2005 hearing actually function as a real parole hearing, rather than as a rubberstamp denial rooted in the retroactive application of the current eligibility guidelines." *Ibid.*

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Heck* v. *Humphrey*, 512 U.S. 477, 487 (1994), the Court held that a state prisoner cannot advance a claim under 42 U.S.C. § 1983 that would "necessarily imply the invalidity of his conviction or sentence," unless and until he has first invalidated the underlying "conviction or sentence." This case raises questions concerning the meaning of that standard as well as its applicability to certain challenges brought by respondents to procedures used in discretionary parole proceedings.

In addition to *Heck* itself, this Court has applied or discussed the *Heck* standard in four cases: *Edwards* v. *Balisok*, 520 U.S. 641 (1997); *Spencer* v. *Kemna*, 523 U.S. 1, 17 (1998); *Muhammad* v. *Close*, 124 S. Ct. 1303 (2004); and *Nelson* v. *Campbell*, 124 S. Ct. 2117 (2004). Taken together, these decisions establish four guideposts as to how the analysis under *Heck* must be conducted: (1) it is built upon a careful analysis of the precise claims asserted in a prisoner's Section 1983 lawsuit; (2) it requires an examination of whether the asserted claims, if successful, would "necessarily imply the invalidity" of the prisoner's conviction or sentence, which in turn requires an evaluation of the likely impact of success on the legality of the prisoner's conviction or term of confinement; (3) it requires courts to look beyond the labels used by the parties in assessing that impact; and (4) it does not lend itself to categorical rules.

In the decision below, the Sixth Circuit faithfully adhered to these principles in applying *Heck*'s standards to Dotson's claims. Although the eleven members of the en banc court and three-judge panel may have differed slightly in their interpretation of Dotson's complaint and in certain details of their analysis, they all agreed that *Heck* presents no impediment to the adjudication of Dotson's *ex post facto* claims under Section 1983. That holding was correct and should be affirmed.

Petitioners, in contrast, invite this Court to ignore all of the guideposts developed in this Court's previous cases involving

Heck. Thus, petitioners largely ignore the two primary *ex post facto* claims that are actually advanced in Dotson's complaint – both forward-looking challenges to the use of certain procedures and parole-eligibility standards in *future* parole proceedings – and instead largely base their argument on a questionable interpretation of what is at best a subsidiary claim in Dotson's complaint. Next, petitioners invite the Court to evaluate whether Dotson's claims "necessarily imply the invalidity of his conviction or sentence" (*Heck*, 512 U.S. at 487) by examining the likely impact that success on those claims will have *not* on the legality of Dotson's conviction or term of confinement *but rather* on the validity of a state administrative decision (here, a hearing officer's non-binding recommendation concerning the scheduling of a future parole hearing). Petitioners also offer up a new label of their own invention, urging the Court to hold that *Heck* bars Dotson's claims because the parole officer's scheduling recommendation amounts to a "sentencing decision." Finally, petitioners champion several new categorical rules that would preclude under *Heck* any prisoner claim that either can be said to cast doubt on a state administrative decision that might somehow, someday, "affect" a prisoner's sentence, or that might require a new hearing of some sort. These arguments are all mistaken.

I. Dotson's complaint advances two *ex post facto* claims targeting the anticipated use by Ohio officials of certain parole-eligibility standards and hearing procedures in *future* parole proceedings. On those claims, he seeks permanent injunctive and associated declaratory relief that would require Ohio parole officials to comply with the mandates of the *Ex Post Facto* Clause in the future. These claims plainly are not barred by *Heck* because they do not "necessarily imply the invalidity" of either Dotson's conviction or his term of confinement. Indeed, Dotson's claim that he will be entitled to annual parole release hearings following the second denial of parole by the Ohio parole officials – which petitioners conveniently ignore – carries no implication whatsoever for any past administrative decision or recommendation made by the State.

To the extent that Dotson's complaint also challenged a hearing officer's recommendation (made to the Parole Board during the 2000 halfway review) that Dotson's next parole release hearing *not* be rescheduled, that claim, if successful, would merely entitle Dotson to a new scheduling recommendation by the parole officer. The new recommendation might or might come out the same way, and it might or might not be accepted by the Parole Board. If a favorable recommendation were made by the hearing officer *and* accepted by the Board, the result would be a scheduling decision allowing Dotson an earlier parole release hearing. But since parole is entirely discretionary in Ohio, the outcome of that hearing might or might not result in Dotson's release. As this attenuated chain of causation suggests, Dotson's challenge to a preliminary stage of a scheduling decision concerning his next parole hearing, if successful, would not "necessarily imply" that his sentence or continuing incarceration was illegal. And, in any event, Dotson's challenge to the 2000 recommendation has now been effectively mooted by the Parole Board's intervening decision in April 2002 to conduct a new parole review – and make a superseding decision as to scheduling.

II. Petitioners' argument that Dotson's claims fall within the *exclusive* province of habeas, and therefore are absolutely barred under *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), should be rejected. The argument is outside the scope of the questions presented, which relate exclusively to the meaning and proper application of the *Heck* standard, and it was neither raised nor decided below. The argument is also wrong. Dotson is not challenging the legality of his conviction or his sentence; he is challenging the procedures and standards that will be applied to him in future parole proceedings. Because Dotson does not contend that his confinement or sentence is illegal – the situation habeas is designed to address – habeas is *not* the exclusive means to bring his claims before a federal court. Indeed, Dotson's claims may not be cognizable at all in habeas.

III. Petitioners fare no better in arguing (Br. 43) that "concerns of comity and federalism" justify expanding the *Heck* doctrine to cover Dotson's claims. Their argument overlooks the fact that Congress, by including an expanded exhaustion requirement applicable to prisoner claims in the Prison Litigation Reform Act of 1995, has already given the States a means to ensure that parole officials will have the first opportunity to correct federal constitutional violations relating to parole procedures. 42 U.S.C. § 1997e(a). To the extent petitioners want more, their arguments are properly directed at Congress. Petitioners' other arguments based on comity are all unavailing.

ARGUMENT

This case calls on the Court once again to clarify the relationship between 42 U.S.C. § 1983 and 28 U.S.C. § 2254. By its plain terms, Section 1983 broadly authorizes "any citizen of the United States or other person within the jurisdiction thereof" who has been "subjected * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws" to initiate a suit in federal court against any "person" who has caused the deprivation "under color of any statute, ordinance, custom, or usage, of any State or Territory of the District of Columbia." The narrower habeas corpus statute, 28 U.S.C. § 2254, authorizes "a person in custody pursuant to the judgment of a State court" to file an "application for a writ of habeas corpus" in the federal courts. Specifically, Section 2254 authorizes "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court" to "entertain" such an application, but "*only* on the ground that [the applicant] is in custody in violation of the Constitution or laws or treaties of the United States." *Id.* § 2254(a) (emphasis added); see also 28 U.S.C. § 2241. Before a federal court will entertain such a habeas petition, however, the applicant ordinarily must "exhaust[] the remedies available in the courts of the State." *Id.* § 2254(b).

Over the years, Congress has made adjustments to both statutes in response to the special problems and issues that arise

in connection with state prisoners' use of the federal courts to challenge the legality of actions of state officials. In 1948, Congress amended Section 2254 to codify the exhaustion doctrine first recognized in *Ex parte Royall*, 117 U.S. 241 (1886). See *Preiser* v. *Rodriguez*, 411 U.S. 475, 488 n.8 (1973). More recently, Congress undertook an extensive revision of the habeas laws – including Section 2254 – by passing the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. AEDPA imposes many new limitations on the availability of habeas corpus for state prisoners. See, *e.g.*, 28 U.S.C. §§ 2244(d)(1) (imposing one-year limitations period), 2244(b)(2) (limiting bases for relief in second or successive petitions), 2254(d) (limiting bases for relief where claim was adjudicated on the merits by state courts).

Congress has also repeatedly amended Section 1983 to take account of litigation by state prisoners. Thus, although exhaustion of state remedies is generally "not a prerequisite to an action under § 1983" (*Patsy* v. *Board of Regents*, 457 U.S. 496, 507 (1982)), Congress in 1980, as part of the Civil Rights for Institutionalized Persons Act, 94 Stat. 352, enacted a "limited exhaustion provision" (*McCarthy* v. *Madigan*, 503 U.S. 140, 150 (1992)) applicable to "any action brought pursuant to section 1983" by an adult prisoner. 42 U.S.C. § 1997e (1994 ed.); see *Porter* v. *Nussle*, 534 U.S. 516, 523-24 (2002). More recently, Congress enacted the Prison Litigation Reform Act of 1995 (PLRA), 110 Stat. 1321-73, which, among other things, "invigorated the exhaustion prescription" (*Porter*, 534 U.S. at 525) applicable to prisoner claims brought under Section 1983, see 42 U.S.C. § 1997e(a), and imposed many other special limitations and restrictions civil rights suits by prisoners. *Porter*, 534 U.S. at 532; see also *Booth* v. *Churner*, 532 U.S. 731, 739-41 (2001). See generally Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1627-33 (2003) (describing changes made by PLRA).

In addition to these many adjustments by Congress, this Court repeatedly has addressed the intersection of the habeas

corpus statute and Section 1983. *E.g.*, *Preiser*, *supra*; *Heck* v. *Humphrey*, 512 U.S. 477 (1994). In *Heck*, the Court held that a prisoner cannot advance a damages claim under Section 1983 that would "necessarily imply the invalidity of his conviction or sentence," unless and until he has first invalidated the underlying "conviction or sentence." *Id.* at 487, 490; see also *Muhammad* v. *Close*, 124 S. Ct. 1303, 1306 (2004) (referring to *Heck*'s "favorable termination requirement"). The questions presented in this case involve the meaning and applicability of the "favorable termination" requirement announced in *Heck*. As we explain below, the Sixth Circuit was correct in concluding that *Heck* presents no bar to respondent Dotson's claims.

I. BECAUSE DOTSON'S CLAIMS, IF SUCCESSFUL, WOULD NOT "NECESSARILY IMPLY THE INVALIDITY" OF HIS CONVICTION OR SENTENCE, THEY ARE NOT BARRED BY *HECK*

The inquiry under *Heck* v. *Humphrey* properly focuses on the consequences that a state prisoner's Section 1983 claim holds, if successful, for the State's legal authority to incarcerate the prisoner. So much is clear not only from *Heck* itself, but also from the cases on which it built, and from the cases that have built on it. In all of these cases, this Court has consistently held that Section 1983 yields to habeas only if the prisoner seeks relief from a federal court that necessarily undermines the conviction or the sentence itself. Accordingly, the only state decisions that *Heck* shields from attack under Section 1983 are those that, if invalidated by a federal court, would render the fact or duration of the prisoner's confinement unlawful and therefore imply that the prisoner is entitled to immediate or speedier release. As we explain below, Dotson's *ex post facto* claims do not fall within that category.

A. This Court's Cases Clearly Establish The Scope Of *Heck*'s "Favorable Termination" Requirement

1. *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), is *Heck*'s most important progenitor. *Preiser* involved suits by state

prisoners under Section 1983 challenging the constitutionality of prison disciplinary proceedings in which the prisoners were deprived of good-conduct-time credits they had previously earned. The prisoners "sought injunctive relief to compel restoration of the credits, which in each case would result in their immediate release from confinement in prison." *Id.* at 476-77. The Court held that equitable relief of this kind was not available under Section 1983, and that the prisoners' "exclusive remedy" was under the habeas corpus statute. *Id.* at 489.

This was the first time that the Court had directly confronted the intersection of Section 1983 and habeas corpus. In holding that certain claims brought by state prisoners (despite coming within the broad, literal language of Section 1983) were cognizable *exclusively* in habeas, the Court emphasized two features that together placed a prisoner's claim at the "core," *id.* at 489, or "heart," *id.* at 498, of the habeas statute: (1) the claim "goes *directly* to the constitutionality of his physical confinement *itself*," *id.* at 489 (emphasis added); and (2) it "seeks either immediate release from that confinement or the shortening of its duration," *ibid.* The Court thus specifically distinguished cases in which a prisoner was not "challenging the fact or duration of his physical confinement itself," and was not "seeking immediate release or a speedier release from that confinement." *Id.* at 498. As to those types of claims, the Court made clear, Section 1983 continues to provide prisoners with a remedy for constitutional wrongs. See *id.* at 499.[6]

One year later, in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), the Court held that a class of Nebraska prisoners could invoke Section 1983, among other things, to challenge on due process grounds the "rules, practices, and procedures" used by the State to deprive prisoners of their good-time credits. *Id.* at 553-55.

[6] *Preiser* also included *dicta* regarding the effect of its holding on a claim, which the prisoners there had not made, for compensatory damages based on alleged unconstitutional conduct. The Court suggested that, "[i]n the case of a damages claim, habeas corpus is *not* an *appropriate or available* federal remedy." 411 U.S. at 494 (emphasis added).

The prisoners in *Wolff* "sought three types of relief: (1) restoration of good time; (2) submission of a plan by the prison authorities for a hearing procedure in connection with withholding and forfeiture of good time which complied with the requirements of due process; and (3) damages for the deprivation of civil rights resulting from the use of the allegedly unconstitutional procedures." *Id.* at 553. The Court explained that, although the first form of relief was "foreclosed under *Preiser*," the prisoners could maintain their due process claims for declaratory relief and damages in a Section 1983 action. *Id.* at 554.

In reaching that result, the Court noted that in *Preiser* it had been "careful to point out that habeas corpus is not an appropriate or available remedy for damages claims, which, if not frivolous * * * could be pressed under § 1983 along with suits challenging the conditions of confinement." 418 U.S. at 554. The prisoners' "damages claim," the Court held, "was therefore properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct." *Ibid.* "Such a declaratory judgment as a predicate to a damages award would not be barred by *Preiser*," the Court added, "because under that case *only* an injunction restoring good time improperly taken is foreclosed." *Id.* at 555 (emphasis added). Finally, the Court explained that nothing in *Preiser* would "preclude a litigant with standing from obtaining" under Section 1983 "by way of ancillary relief an otherwise proper *injunction* enjoining the *prospective enforcement* of invalid prison regulations." *Ibid.* (emphasis added).[7]

[7] In *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), the Court upheld the use of Section 1983 by pretrial detainees who challenged, on Fourth Amendment grounds, state procedures that allowed extended pre-trial detention, without a prior judicial determination of probable cause, of persons who had been arrested without a warrant and charged by information. In the lower courts, the detainees had obtained declaratory and injunctive relief, including an order directing various officials of Dade County, Florida, to provide them with judicial hearings at which probable cause for their detention could be determined (and, presumably, following which the detainees would be or-

2. After *Wolff* and *Gerstein*, the Court had no occasion to revisit the intersection of Section 1983 and habeas corpus until *Heck* v. *Humphrey*, 512 U.S. 477 (1994), nearly two decades later. Although *Heck* answered certain questions left unresolved by *Preiser*, it did not disturb the fundamental line the Court had previously drawn between those prisoner claims cognizable exclusively in habeas and those that may be brought under Section 1983. *Heck* did go beyond *Preiser*, however, in imposing a new "favorable termination" requirement on certain prisoner Section 1983 claims that were *not* precluded altogether under the rule of *Preiser*.

At issue in *Heck* was a claim brought by a prisoner seeking damages as compensation for an allegedly "unconstitutional conviction or imprisonment" (based on claims that state prosecutors and investigators had conducted an unlawful investigation leading up to his arrest, destroyed exculpatory evidence that would have exonerated him, and used an illegal voice identification procedure at his trial). 512 U.S. at 479-80 & n.2, 486. The prisoner, in other words, sought to recover damages for harm flowing directly from an allegedly illegal conviction and incarceration. See *id.* at 480 n.2 (emphasizing that prisoner's damages claims were "premised on an unlawful conviction"); *id.* at 487 n.6 (referring to "damages directly attributable to conviction or confinement"). Concluding that the prisoner's suit "challenged the legality of the conviction," the Court held that it could not proceed under Section 1983 unless and until the prisoner first "invalidated" the underlying conviction. *Id.* at 487, 490. In announcing this "favorable termination requirement" (*Muhammad* v. *Close*, 124 S. Ct. 1303, 1306 (2004)), the Court in *Heck* relied on an analogy to the "common-law cause of action for malicious prosecution." 512 U.S. at 484.

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dered released from custody if probable cause was found to be lacking). *Id.* at 106-07 & n.6. As in *Preiser*, the Court focused on release as the touchstone of whether the prisoners' Fourth Amendment claims could be pursued under Section 1983. "Because release was neither asked for nor ordered," the Court reasoned, "the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy." *Id.* at 107 n.6.

The basic alteration that *Heck* performed on *Preiser* was to remove the latter's suggestion that the *relief* actually sought by the prisoner controls whether his claim can be brought under Section 1983. Whereas *Preiser* had suggested that prisoners who seek damages are not attacking the fact or length of their confinement, *Heck* pointed out that this was not necessarily true "when establishing the basis for the damages claim *necessarily* demonstrates the invalidity of the conviction." 512 U.S. at 481-82 (emphasis added). Thus, what matters for purposes of *Heck*'s "favorable termination" requirement is not what the prisoner asks for in his complaint, but instead what the necessary practical implications of a successful Section 1983 suit would be. If the plaintiff, in order to prevail, would have to "prove the unlawfulness of his conviction or sentence" – *i.e.* those criminal judgments that give the state the legal authority to deprive an individual of his liberty – the claim cannot be pursued under Section 1983 without first invalidating the conviction or sentence, regardless of what remedy the plaintiff actually requests. 512 U.S. at 486.[8]

To clarify the scope of the new "favorable termination" requirement, the Court in *Heck* gave two examples of claims that would (or would not) be covered. *Heck*'s "favorable termination" requirement, the Court first explained, applies to claims for damages not only "for allegedly unconstitutional conviction or imprisonment" itself but also "for other harm caused by actions whose unlawfulness would render a conviction or

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[8] *Heck* recognized, in distinguishing *Wolff*, that not *all* claims for damages are barred. Again, it was not the nature of the remedy, but instead the actual effect of the suit, that controlled. In *Wolff*, the prisoners had sought damages based on the "use of [] allegedly unconstitutional procedures" in taking away their good-time credits. 418 U.S. at 553. Because there was no reason to believe that using the wrong procedures "necessarily vitiated the denial of good-time credits," the claim "did not call into question the lawfulness of the plaintiff's continuing confinement." *Heck*, 512 U.S. at 483. This passage reaffirms that the *Heck* bar comes into play *only* if the prisoner's claim actually threatens the State's legal authority to incarcerate that prisoner, or to do so for a particular period of time.

sentence invalid." 512 U.S. at 486-87. The Court cited the example of a state prisoner "convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest," who later sued the arresting officer alleging that his Fourth Amendment rights had been violated. *Id.* at 487 n.6. Because such a prisoner would "have to negate an element of the offense of which he was convicted" – the lawfulness of the arrest – "[i]n order to prevail in this § 1983 action," the claim would be barred under *Heck*. *Ibid.* On the other hand, "a suit for damages attributable to an allegedly unreasonable search may lie," the Court explained, "even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction." *Ibid.* "Because of doctrines like independent source and inevitable discovery," the Court reasoned, "such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful." *Ibid.* (emphasis in original).[9]

3. In *Edwards* v. *Balisok*, 520 U.S. 641 (1997), the Court applied *Heck* to a prisoner's challenge to the validity of the procedures that were used at a disciplinary hearing to deprive him of good-time credits. Specifically, the prisoner alleged that prison officials violated his due process rights when they excluded exculpatory evidence, failed to provide written findings to support their decision, and committed other procedural violations, all at a hearing that had resulted in the deprivation of his accrued good-time credits. *Id.* at 644.

[9] Concurring in the judgment in *Heck*, Justice Souter's separate opinion reasoned that, rather than relying on an analogy to the common law of malicious prosecution, the Court should "follow the interpretive methodology employed in *Preiser*," according to which the "general" § 1983 statute must be read in light of the more "specific" habeas statute, so that where the latter is unavailable (because, for example, a prisoner is no longer in "custody"), no "favorable termination" requirement should apply. 512 U.S. at 497 (Souter, J., joined by Blackmun, Stevens, and O'Connor, JJ.).

In *Balisok*, the prisoner's Section 1983 claim did not purport to challenge the outcome of the disciplinary decision directly; instead, it rested on the assertion that the *procedures* used to reach the decision were deficient. 520 U.S. at 645. Thus, the question before the Court was whether *Heck* permitted Section 1983 claims styled as challenges to procedures rather than to results. In resolving that question, this Court rejected the Ninth Circuit's categorical view that "a claim challenging only procedures employed in a disciplinary hearing is *always* cognizable under § 1983." *Id.* at 645 (emphasis added). Consistent with the principal teaching of *Heck*, the Court reaffirmed that the label affixed to a claim is not dispositive. What mattered was the *actual effect* that the Section 1983 claim would have, if successful, on the legality of the prisoner's sentence or duration of confinement. See 520 U.S. at 645.

The Court focused carefully on the prisoner's specific claims. Among other things, the Court explained, the prisoner alleged that he was "*completely* denied the opportunity to put on a defense" when "all [exculpatory] witness testimony * * * was excluded" – an "obvious procedural defect" that, when established in other cases, had led many "state and federal courts [to] * * * reinstate[] good-time credits." 520 U.S. at 646-47 (emphasis added). Even more significant, the prisoner "asserted that the cause of the exclusion of the exculpatory evidence was the *deceit and bias* of the hearing officer himself." *Id.* at 647 (emphasis added). That claim, this Court took pains to point out, would, if successful, necessitate the invalidation of the decision to lengthen the prisoner's incarceration by depriving him of good-time credits (because such a claim is not subject to harmless error). *Ibid.* (citing *Tumey* v. *Ohio*, 273 U.S. 510 (1927)). The Court concluded that the prisoner's claim was barred under *Heck* insofar as "the principal procedural defect" that he complained of – a biased decisionmaker – would, if established, "necessarily imply the invalidity of the deprivation of his good-time credits." 520 U.S. at 646.

That result, the Court observed, was "clearly envisioned by *Heck*." 520 U.S. at 645. Indeed, the holding in *Balisok* simply clarifies *Heck*'s rule – that Section 1983 cannot be used as a vehicle to undercut the validity of a conviction or sentence and secure speedier release – by applying it in the context of an attack that purports to be strictly procedural.[10] Cf. *Leamer* v. *Fauver*, 288 F.3d 532, 541 (3d Cir. 2002) (in *Balisok*, "the Court found that a plaintiff could not mask a claim that really required habeas relief as a § 1983 claim"). Like *Heck*, *Balisok* forecloses creatively pleaded claims that, in essence, seek to undo an "outstanding criminal judgment," *Heck*, 512 U.S. at 487, and thereby to expedite the prisoner's release by casting a shadow over the legal basis for his confinement.

Balisok also elucidated *Heck* in another important respect. The decision clarified that requests for prospective injunctive relief that do *not* implicate the validity of a conviction or sentence (and that therefore do nothing to shorten the lawful term of confinement) "may properly be brought under § 1983." 520 U.S. at 648. The Court addressed that issue in *Balisok* when discussing the prisoner's additional request for an injunction requiring prison officials to date-stamp witness statements when they are received. *Ibid.* In deciding that this request for relief could proceed immediately under Section 1983, the Court made clear that "[o]rdinarily, a prayer for such *prospective* relief will not 'necessarily imply' the invalidity of a *previous* loss of good-time credits, and so may properly be brought under § 1983." *Id.* at 648 (emphasis added).

In a concurring opinion, Justice Ginsburg, joined by Justices Souter and Breyer, underscored the limited nature of the Court's holding. They emphasized that the prisoner's allega-

[10] *Balisok* does not, however, stand for the proposition that all procedural attacks are foreclosed; rather, like *Heck*, it holds that the issue is not the label, but the effect of the claim. Procedural claims that do not necessarily imply the invalidity of the sentence itself (such as the one made in *Wolff*, which both *Heck* and *Balisok* distinguished, but left undisturbed, see 520 U.S. at 645-46) are cognizable under Section 1983.

tions concerning "other procedural defects," such as the failure to make written findings, are *not* barred by *Heck* because they "would not necessarily imply the invalidity of the deprivation of his good-time credits." 520 U.S. at 649-50.

4. Last Term, the Court revisited *Heck* in two cases.[11] The first arose, like *Balisok*, in the context of a challenge to an adverse prison disciplinary action. In *Muhammad* v. *Close*, 124 S. Ct. 1303 (2004), a prisoner who had been involved in an altercation with a prison guard was found guilty of insolent behavior (but acquitted of a more serious charge of "threatening behavior"). The prisoner sued for damages for six days of special detention he was forced to undergo because he was charged with the more serious infraction. He alleged that the prison guard had charged him with threatening behavior (and thus subjected him to the special detention) in retaliation for prior lawsuits and grievance procedures the prisoner had brought against the guard. *Id.* at 1305. The prisoner pointedly refrained from challenging his conviction for insolent behavior or the penalties he received for that infraction. *Ibid.*

After describing the *Heck* rule, the Court reiterated that it does not preclude a prisoner's Section 1983 claim that "threatens no consequence for his conviction or the duration of his sentence." 124 S. Ct. at 1304.[12] In contrast to *Balisok*, the

[11] The Court had one intervening occasion to discuss the *Heck* rule. In *Spencer* v. *Kemna*, which involved a constitutional challenge to the procedures used in revoking parole, the Court reiterated that *Heck* would have "no application at all" to a Section 1983 suit by a prisoner seeking damages for "'using the wrong procedures, not reaching the wrong result,'" so long as the procedural defect did not "'necessarily imply the invalidity'" of the sentence under which he was confined. 523 U.S. 1, 17 (1998) (quoting *Heck*, 512 U.S. at 482-83, 487, and citing the several opinions in *Balisok*).

[12] "The assumption," the Court added, "is that the incarceration that matters under *Heck* is *the incarceration ordered by the original judgment of conviction*, not special disciplinary confinement for infraction of prison rules." 124 S. Ct. at 1304 n.1 (emphasis added). The Court also observed that it had "never followed the speculation in *Preiser* • • • that such a prisoner subject to 'additional and unconstitutional restraint' might have a

disciplinary decision challenged in *Muhammad* did not eliminate any good-time credits. This made all the difference, as the Court held that, in the "absence of any implication going to the fact or duration of [the] underlying sentence," *Heck* presents no obstacle to challenges to administrative decisions made by prison officials. 124 S. Ct. at 1306. *Muhammad* thus affirms that *only* those prison proceedings whose results actually "affect the duration of time to be served" are covered by *Heck*; where neither the "validity of the underlying conviction" nor the "duration of time to be served" is at stake, the prisoner may proceed under Section 1983. *Ibid.*[13]

Finally, in *Nelson* v. *Campbell*, 124 S. Ct. 2117 (2004), the Court upheld a death-row inmate's use of Section 1983 to challenge the "cut-down" procedure that a State proposed to use in carrying out a sentence of death by lethal injection. The Court acknowledged its holdings in *Preiser* that (1) a prisoner's claim for "injunctive relief challenging the fact of his conviction or the duration of his sentence" falls within the "core" of habeas corpus and thus is not cognizable under Section 1983; and (2) "constitutional claims that merely challenge the conditions of a prisoner's confinement * * * fall outside of that core and may be brought pursuant to § 1983 in the first instance." 124 S. Ct. at 2122. Observing that it had not "yet had occasion to consider

habeas claim independent of § 1983, and the contention is not raised by the State here." *Ibid.* (quoting *Preiser*, 411 U.S. at 499).

[13] In *Muhammad*, the Court rejected the court of appeals' view "that *Heck* applies categorically to all suits challenging prison disciplinary proceedings." 124 S. Ct. at 1306. Although prison disciplinary proceedings "may affect the duration of time to be served (by bearing on the award or revocation of good time credits)," the Court explained, "that is not *necessarily* so." *Ibid.* (emphasis added). Because, in *Muhammad*, no good-time credits "were eliminated by the prehearing action Muhammad called in question," the prisoner's suit "could not be construed as seeking a judgment at odds with his conviction or the State's calculation of time to be served." *Ibid.* Because of these characteristics, the suit "raised no claim on which habeas relief could have been granted on any recognizable theory, with the consequence that *Heck*'s favorable termination requirement was inapplicable." *Ibid.*

whether civil rights suits seeking to enjoin the use of a particular method of execution * * * fall within the core of federal habeas corpus," the Court pointed out that "[n]either the 'conditions' nor the 'fact or duration' label is particularly apt" for such claims. *Id.* at 2122-23. But there was no need to reach the "difficult question of how to categorize method-of-execution claims generally" because the inmate's particular challenge was to a cut-down procedure that, he alleged, was wholly unnecessary to carry out the death sentence. *Id.* at 2123. That particular claim, the Court ruled, is cognizable under Section 1983.

The Court emphasized that its holding was "consistent with our approach to civil rights damages actions, which, like method-of-execution challenges, fall at the margins of habeas." 124 S. Ct. at 2124. In that connection, the Court took note of *Heck* and its preclusion of damages suits that "*necessarily imply*" the invalidity of the fact or duration of confinement. *Ibid.* (emphasis added). *Heck*'s "favorable termination requirement," the Court explained, "is necessary to prevent inmates from doing indirectly through damages actions what they could not do directly by seeking injunctive relief – challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute." *Ibid.* "Even so," the Court added, "we were careful" in *Heck* "to stress the importance of the term 'necessarily[]'" in *Heck*'s test. That term ensured that "potentially valid damages actions" are not "cut off" where "a plaintiff *might* never obtain favorable termination – suits that could otherwise have gone forward had the plaintiff not been convicted." *Ibid.* (emphasis added).[14]

5. As the foregoing review makes clear, this Court's cases shed substantial light not only on the meaning of the *Heck*

[14] Notably, the Court rejected the State's argument that the cut-down procedure was "part of the execution procedure" and, accordingly, the inmate was challenging "the fact of his execution." 124 S. Ct. at 2123. "Merely labeling something as part of an execution procedure," the Court explained, "is insufficient to insulate it from a § 1983 attack." *Ibid.*

standard but also on how the analysis of *Heck* issues must be conducted. When read together, *Heck* and the cases that follow it present a consistent set of principles regarding when Section 1983 is unavailable to a prisoner.

At bottom, what ultimately matters under *Heck* is the substantive effect that a successful Section 1983 claim will *necessarily* have on the State's legal authority to impose its chosen punishment on the prisoner. To come within *Heck*'s ambit, a prisoner's claim must, if successful, "necessarily" suggest that the State would act unlawfully were it to carry out the full extent of its sentence (whether, as in *Nelson*, by executing the prisoner, or, as in *Balisok*, by keeping him confined for the additional time allowed by the State's decision to cancel his good-time credits). In contrast, a Section 1983 suit in which a victory by the prisoner would not necessarily imply the impermissibility of either the length or the fact of the sentence can proceed unimpeded.

This Court's cases involving *Heck* have established four guideposts concerning how the analysis under *Heck* should be conducted. First, the analysis is built upon a careful review of the precise claims that are asserted in a prisoner's Section 1983 lawsuit. See *Heck*, 512 U.S. at 479-80 & n.2, 487 & n. 6; accord *Nelson*, 124 S. Ct. at 2123-25; *Muhammad*, 124 S. Ct. at 1305-06; *Balisok*, 520 U.S. at 644-48; *id.* at 649-50 (Ginsburg, J., concurring). Second, as both *Heck* and *Balisok* make clear, a proper assessment of whether a prisoner's claims "necessarily imply the invalidity" of a conviction or sentence requires an evaluation of the likely impact that success on the claims will have on the legality of the prisoner's conviction or term of confinement. Third, in evaluating that impact, courts must look beyond labels used by the parties. See *Nelson*, 124 S. Ct. at 2123 ("Merely labeling something as part of the execution procedure is insufficient to insulate it from § 1983 attack."). And fourth, the *Heck* inquiry does not lend itself to categorical rules. See, *e.g.*, *Muhammad*, 124 S. Ct. at 1306 (rejecting court of appeals' view "that *Heck* applies categorically to all suits

challenging prison disciplinary proceedings"); *Balisok*, 520 U.S. at 645 (rejecting court of appeals' categorical view that "a claim challenging only procedures employed in a disciplinary hearing is always cognizable under § 1983"). With these basic principles in mind, we turn to an evaluation of Dotson's claims.

B. Dotson's Alleged Challenge To The 2000 Scheduling Recommendation Is Not Barred By *Heck*

As explained above (see pages 5-6 & note 4, *supra*), Dotson's complaint advanced two *ex post facto* claims for permanent injunctive (and associated declaratory) relief. These claims challenged the retroactive application to him in future parole proceedings of certain new parole-eligibility standards and procedural regulations. Largely ignoring these claims, and thus ignoring one of this Court's clear guideposts, petitioners focus most of their arguments on a *third* claim they say Dotson advances. According to petitioners, Dotson's complaint challenges the scheduling recommendation made by the hearing officer during Dotson's halfway review in 2000. Because that scheduling recommendation was *also* based on the retroactive application of the 1998 guidelines, and because the complaint asked that Ohio officials be "permanent[ly]" enjoined to "proceed toward" a parole hearing that is "prompt and immediate" (J.A. 20 (Cplt. ¶ 3)), petitioners contend that Dotson was actually seeking an order *vacating* the parole officer's recommendation and requiring him to conduct his review again.

Although petitioners' interpretation of the complaint is debatable (see note 4, *supra*), even if they are correct that Dotson's complaint included a claim challenging the 2000 recommendation itself, that claim would not be barred by *Heck*. There are several reasons why that is so.

1. The hearing officer's recommendation has been superseded by events – in particular, by the Parole Board's decision in April 2002, while the appeal of this case was pending in the Sixth Circuit, to conduct a review of Dotson's parole status and issue a new scheduling decision. As a

consequence of that development, the scheduling recommendation made by the hearing officer during the 2000 halfway review – as to which the record is silent concerning whether it was accepted or rejected by the Parole Board chairman – has now been superseded. Even if the hearing officer's non-binding recommendation was accepted by the chairman of the Parole Board, the Parole Board has now revisited the scheduling question and decided anew not to move up the June 2005 release hearing. Plainly, Dotson's complaint does not challenge the April 2002 decision. Because the hearing officer's recommendation in 2000 has no continuing effect, any challenge to it has become moot.[15]

2. Even if Dotson's claim challenging the 2000 recommendation were not moot, it would not be barred under *Heck*. Success on such a claim would have no impact at all on Dotson's conviction; petitioners do not suggest otherwise. Nor would success necessarily invalidate Dotson's sentence, undermine the State's custodial authority over him, or in any way suggest that the State is obliged to expedite his release. Indeed, the parole officer's recommendation is multiple steps and contingencies removed from having any discernible effect upon Dotson's sentence. Because Dotson's success in challenging the 2000 recommendation on *ex post facto* grounds would not "necessarily imply the invalidity" of Dotson's conviction or sentence, *Heck* presents no barrier to that claim.

Several features of the hearing officer's recommendation underscore this point. To begin with, the recommendation is just that – a recommendation. Although petitioners at one point suggest, incorrectly, that the hearing officer exercises

[15] Even if the Parole Board had not conducted a review of Dotson's parole status and issued a new scheduling decision in April 2002, the parole officer's scheduling recommendation during the 2000 halfway review likely would have become irrelevant (and any claim challenging it moot) before this case is decided because of the pendency of the June 2005 release hearing. Put differently, the actual occurrence of that hearing will effectively moot any issue as to whether it should have been scheduled earlier.

"sentencing discretion" and has the authority to "move * * * up" the date of Dotson's parole hearing (Pet. Br. 22), in fact the decision as to scheduling ultimately rests with the Parole Board itself (or its chairman) – as petitioners acknowledge elsewhere in their brief. See Pet. Br. 10 ("The chair * * * decides whether to advance the hearing."). Thus, the hearing officer's recommendation is non-binding.

Petitioners' argument also overlooks the possibility that the 2000 halfway review might have come out the same way even if the 1998 parole guidelines had not been invoked by the hearing officer. Even without applying those guidelines, the hearing officer might well have elected, for independent reasons, to recommend against moving up the date of Dotson's next parole hearing. And even if he *had* made a different recommendation, it is uncertain whether that would have affected the ultimate scheduling decision of the Parole Board's chairman. Thus, petitioners are wrong to suggest that success on Dotson's *ex post facto* challenge to the use of the 1998 guidelines by the hearing officer in formulating his non-binding recommendation would "necessarily invalidate" or change the outcome of *even the scheduling decision* made during the halfway review.

In addition, it must be remembered that the administrative decision made at the halfway review did not involve the grant or denial of parole. Parole was not considered; the decision instead had to do solely with the *scheduling* of Dotson's next parole release hearing.[16] Thus, even if the hearing officer

[16] Petitioners suggest that Dotson's claims *do* in fact implicate the validity of his conviction and sentence because parole scheduling decisions "affect the duration of confinement." Br. 22. This is true, according to petitioners, because a "prisoner cannot obtain parole release except through a parole release hearing." Br. 22. But the simple fact that a prisoner *can* obtain release through a parole hearing does not convert every parole scheduling decision into a state decision that goes to the validity of the sentence and allows for speedier release. Indeed, scheduling decisions, such as the one evidently made by the Board at Dotson's halfway review, are not the source of the State's power to continue to incarcerate a prisoner. The underlying sentence

changed his recommendation *and* the Parole Board elected to move up the date of Dotson's next parole release hearing, that would not necessarily change the *duration* of Dotson's term of incarceration. As the en banc majority correctly noted:

> Dotson's challenge to the procedures used to determine the date upon which he will be considered for parole, if successful, would not "necessarily imply" the invalidity of his continued confinement. Rather, success on this challenge would simply provide Dotson with a discretionary parole hearing at which the Parole Board would determine whether parole was appropriate in his case.

Pet. App. 18a. Moreover, as the Sixth Circuit emphasized, in Ohio "the ultimate parole determination is discretionary and based on a host of factors." *Id.* at 17a. For that reason, "it will be difficult to predict any highly likely or inevitable consequence of the parole determination hearing." *Ibid.*

Petitioners' *Heck* argument is thus triply contingent: it depends on the assumption that Dotson's (now-moot) *ex post facto* challenge would result in a new and different recommendation by the hearing officer, which in turn would prompt the Parole Board to move up the next parole release hearing, which in turn would result in Dotson being granted parole at the earlier parole release hearing. That is far too attenuated and speculative a link to the actual duration of Dotson's confinement to satisfy the *Heck* standard.

3. The result is the same even if one focuses not on the outcome of the 2000 halfway review – a scheduling decision – but instead on the substance of Dotson's *ex post facto* challenge and its impact on future parole determinations in his case. As Judge Gilman noted in his separate opinion below, "[t]he nature of Dotson's claim – an attack on the retroactive applicability of Ohio's statutory parole-*eligibility* scheme – does not necessarily imply the invalidity of any judgment by an administrative body

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is. See 67A CORPUS JURIS SECUNDUM: PARDON AND PAROLE § 61 (2004).

that he *is or is not entitled to parole*." Pet. App. 28a (Gilman, J., concurring in part and dissenting in part) (emphasis added). Put differently, Dotson's *ex post facto* challenge to the use of the 1998 parole guidelines, if it succeeds, will merely ensure that at future parole release hearings he will be considered *eligible* for parole (not that he will be entitled to it). That, too, shows that the *Heck* standard is not satisfied here.

C. Dotson's *Ex Post Facto* Claims Challenging Parole-Eligibility Standards And Procedures The State Will Apply To Him In The Future Are Not Barred By *Heck*

1. Although petitioners say virtually nothing about them, at the heart of Dotson's complaint are two *ex post facto* claims for permanent injunctive and declaratory relief. Both claims target procedures and standards that the Ohio Parole Board can be expected to use in the future in discretionary parole proceedings involving Dotson. *First*, Dotson challenges the Board's application of the 1998 guidelines at his future parole hearings. See J.A. 20 (Cplt. ¶¶ 1-2). The result of the Board's retroactive application of those guidelines to Dotson at the June 2005 hearing and beyond, Dotson alleges, will be effectively to rescind his eligibility for parole. Dotson seeks to enjoin the future use of the 1998 guidelines.

Dotson's second *ex post facto* claim challenges another aspect of the procedures that will be used in future parole proceedings. In essence, he contends that, under the regulations in place at the time of his crime, he was entitled to annual parole release hearings following the second denial of parole. See pages 5-6 & n.3, *supra*. Under regulations adopted in 1998, however, the Board is authorized to delay future parole hearings for up to ten years following a second denial of parole. That change, Dotson alleges, also violates the *Ex Post Facto* Clause. Thus, Dotson seeks a permanent injunction directing the Board to provide him with annual release hearings in the future and a declaration that it is required to do so.

2. Dotson's two *ex post facto* claims for a permanent injunction requiring the Board to apply certain procedures and standards in future parole proceedings are not barred by *Heck*. Here again, success on either of those claims obviously would have no impact at all on Dotson's conviction. Nor would success on either claim necessarily invalidate Dotson's sentence, undermine the State's custodial authority over him, or in any way suggest that the State is obliged to expedite his release. Thus, if Dotson prevails on his challenge to the future use of the 1998 guidelines, this will result only in the application of the pre-1998 standards to determine his eligibility for parole at future hearings. Using those standards would not guarantee that Dotson would be released any sooner than he otherwise would be. In fact, as explained above, because the ultimate parole decision lies totally within the discretion of the Parole Board, it is possible that the decision regarding which set of parole guidelines applies to Dotson's claim would make no difference in the amount of time he serves. Thus, as in *Muhammad*, Dotson's claim challenging the future use of the 1998 guidelines "could not be construed as seeking a judgment at odds with his conviction or the State's calculation of time to be served." 124 S. Ct. at 1306.

The same is true of Dotson's claim concerning the frequency of future parole hearings. If Dotson prevails on that claim, the result will be a declaration that it would violate the *Ex Post Facto* Clause not to provide him with annual hearings in the future, following any second denial of parole that might occur. Success on this claim would also mean that Dotson will be afforded annual parole release hearings in the future. Under the 1998 regulations, in contrast, the Board is permitted to delay future release hearings (following the denial of parole at a second release hearing) *for up to ten years*. Here again, nothing about Dotson's success on this claim would invalidate his sentence, undermine the State's custodial authority over him, or in any way suggest that the State is obliged to expedite his release. Because neither of Dotson's principal *ex post facto*

claims would "necessarily imply the invalidity" of his conviction or sentence, they are not barred by *Heck*.

3. Petitioners concede that Dotson's claims for "purely declaratory relief regarding how future hearings are conducted" are "a somewhat closer call" under *Heck* and its progeny. Pet. Br. 30. They nonetheless offer two arguments why those claims are barred. To begin with, petitioners suggest that the Court's statements in *Balisok* "seemed driven more by the nature of the claim being discussed than the prospective or retrospective nature of the relief sought." Pet. Br. 30. Petitioners concede that a claim for injunctive relief based on the ground that "the Warden's alleged refusal to time-stamp documents violated due process" would "not be *Heck*-barred," but they suggest this is so "because such an error simply would not undercut a resulting decision." *Ibid.* Petitioners' reading of *Balisok* is at best implausible. If the Court had relied on the rationale suggested by petitioners, there would have been no need to discuss the nature of the relief sought – or to instruct the lower courts that "a prayer for such prospective relief" will "ordinarily" be cognizable under Section 1983. In any event, the Court's statements in *Balisok* do not break new ground but merely reiterate what the Court has said in earlier cases, including *Wolff* and *Gerstein*.

Next, petitioners contend that Dotson's *ex post facto* challenge to the use of the 1998 guidelines at the June 2005 parole hearing and thereafter would "necessarily imply the invalidity" of "their use at the 2000 halfway review." Pet. Br. 31. That argument is flawed at every turn.

First, the argument rests on the assumption that *Heck* would bar any claim directly challenging the use, during the 2000 halfway review, of the 1998 parole guidelines as a basis for the parole officer's scheduling recommendation. For all of the reasons set forth above, however, that assumption is untrue. Because any claim by Dotson directly challenging the scheduling recommendation does not implicate *Heck*, neither can his future-oriented claim for permanent injunctive relief that

might be said to carry implications for the scheduling recommendation.

Second, this argument rests on the unwarranted assumption that the *ex post facto* issue with respect to the use of the 1998 guidelines *at a future parole release hearing* is *identical* to the *ex post facto* issue relating to the use of those guidelines during the halfway review to make a scheduling recommendation.[17]

Third, petitioners' broad interpretation of *Heck* should be rejected because it would create a new and unwarranted obstacle to the prosecution by state and local prisoners (in both individual and class actions) of claims for permanent injunctive relief that have traditionally been cognizable under Section 1983. In many cases where a prisoner criticizes the State for "'using the wrong procedures, not for reaching the wrong result,'" *Spencer*, 523 U.S. at 17 (quoting *Heck*, 512 U.S. at 482-83), and seeks to require state officials to adhere to federal constitutional standards in future proceedings, the prisoner has been subjected to the challenged procedure at some point in the past.[18] Under the logic of petitioners' position, however, such forward-looking claims would be regarded as "necessarily" calling into question the past use of the procedures against the prisoners. In *Balisok*, for example, the prisoner's claim for injunctive relief "requiring prison officials to date-stamp witness statements at the time they are received" would have

[17] It is at least theoretically possible that parole officers, at halfway reviews, decline to recommend moving up the date of parole hearings 99% of the time even in cases where the inmate is eligible to be considered for parole. If that were true, the application of the 1998 guidelines at the halfway review would have almost certainly made no difference. But the effect at a parole release hearing might be far more significant. Because Dotson's complaint was dismissed on the pleadings, he had no opportunity to use the discovery process to develop, for example, "evidence drawn from the rule's practical implementation by the agency charged with exercising discretion" to support his *ex post facto* claims. *Garner* v. *Jones*, 529 U.S. 244, 255 (2000).

[18] Indeed, if the prisoner has not been subjected to the challenged procedure in the past, the State will likely argue that the prisoner lacks standing to seek injunctive relief.

necessarily called into question earlier administrative decisions that did not adhere to that procedure. 520 U.S. at 648.

Petitioners' argument also should be rejected because it would further complicate the complex inquiry that is now required by *Heck* and would lead to perverse results. In *Gerstein*, for example, the pretrial detainees contended that county officials had violated the Fourth Amendment by declining to provide them with a prior judicial determination of probable cause. Would that claim have implicated – and thus necessarily implied the invalidity of – past "decisions" by county officials? And, if not, why should Section 1983 be available in that setting but not where state or local officials make more formal administrative "decisions" (including non-binding recommendations) that are constitutionally defective? The distinction makes little sense.

Because Dotson's claims for injunctive and declaratory relief with respect to the conduct of future proceedings do not "necessarily imply" the invalidity of his sentence or conviction, they may properly be brought under Section 1983. Should Dotson prevail on his claims, it would cast no shadow over the State's legal authority to incarcerate him. Nor would the State have to take some further action to prevent Dotson's release on terms compelled by a federal court. This Court has never held, or even suggested, that a claim lacking those attributes cannot be pursued under Section 1983. It should not do so for the first time in this case.

D. Petitioners' Remaining Arguments Are All Unavailing

Petitioners seek to avoid the conclusion that *Heck* presents no bar to Dotson's claims by resort to a hodgepodge of other arguments, none of which is persuasive.

1. Petitioners insist that Dotson's Section 1983 claims are barred by *Heck* because they challenge what petitioners repeatedly call a "state sentencing decision" – a decision made by Ohio parole officials about when and on what terms to schedule a hearing to determine Dotson's eligibility for parole.

Br. 19-23, 24, 26, 20. According to petitioners, *Heck*'s limitation on Section 1983 claims extends to "all challenges that would, if successful, necessarily imply, the invalidity of a *sentencing decision*." Pet. Br. 23 (emphasis added); see also *id.* at 24 (arguing that application of the *Heck* bar turns only on the "implications for the state decision" and is not "contingent upon what would follow invalidation of the state decision").

There are several problems with this argument. To begin with, as respondent Johnson persuasively demonstrates (Br. 29-34), the denial of parole is *not* properly characterized as a "sentencing" decision. The premise of petitioners' argument is thus mistaken.[19]

Beyond that, "sentencing decision" is not a term that this Court has used in *Heck* or its progeny. Instead, it is a term invented by petitioners for this case. In *Nelson*, this Court rejected a State's similar attempt to avoid the careful analysis required under *Heck* by resorting to rhetorical sleight of hand. "Merely labeling something as part of an execution procedure," the Court explained, "is insufficient to insulate it from § 1983 attack." 124 S. Ct. at 2123. The careful inquiry on which this Court has repeatedly insisted under *Heck* does not turn on semantics or whether the prisoner's claim would invalidate a state administrative "decision"; instead, invalidation triggers the *Heck* bar only if it actually undermines the conviction or sentence itself and thus suggests the need for immediate or speedier release from confinement. See, *e.g.*, *Muhammad*, 124 S. Ct. at 1304 (*Heck*'s rule is not "implicated by a prisoner's challenge that threatens no consequence for his conviction or the duration of his *sentence*") (emphasis added).

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[19] Although petitioners seek throughout their brief to portray a decision as to when the next parole hearing will be conducted as tantamount to a "sentencing decision" extending the sentence for the duration of the interval until the next hearing, that characterization finds no support in this Court's decisions. See, *e.g.*, *California Dept. of Corrections* v. *Morales*, 514 U.S. 499 (1995) (law decreasing frequency of parole hearings for certain prisoners from every year to every three years does not increase punishment).

"Sentence" – the word actually used in *Heck* – has a specific and definite meaning. It does not, as petitioners suggest, encompass every state decision that could conceivably affect a prisoner's jail time. "'Sentence' * * * is ordinarily meant in the context of criminal law to refer to the judgment or order 'by which a court or judge imposes punishment or penalty upon a person found guilty.'" *United States* v. *Granderson*, 511 U.S. 39, 71 (1994) (Rehnquist, C.J., dissenting) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2068 (1971)); see also *id.* at 71 n.2 ("Federal sentencing law also consistently uses the word 'sentence' to refer to the punishment actually imposed on a defendant."); BLACK'S LAW DICTIONARY 1362 (6th ed. 1990) (defining "sentence" as "[t]he judgment * * * imposing the punishment to be inflicted, usually in the form of a fine, incarceration, or probation"). Like a conviction, then, a sentence is a criminal judgment that justifies punishment, in this case incarceration. Without the imposition of a sentence, the State generally lacks the legal authority to deprive a person of liberty. Similarly, when a federal court invalidates a sentence, the State is stripped of its right to impose a particular quantum of punishment on the prisoner, unless and until it corrects the problem.

The two cases in which this Court has actually barred challenges to sentences under Section 1983 illustrate the meaning of "sentence" in this context. Both *Preiser* and *Balisok* involved attacks on decisions that took away good-time credits that the prisoner had previously accrued. The direct consequence of invalidating those decisions would have been the restoration of the prisoners' credits, which in turn would have necessarily reduced the time that the prisoners could lawfully be incarcerated. Similarly, *Heck* obliges courts to go beyond the potential impact of the federal judgment on that state decision and instead to focus on whether invalidating the state decision would "call into question the lawfulness of the plaintiff's continuing confinement." 512 U.S. at 483. Petitioners are thus simply wrong to say (at 24) that "*Heck*'s holding does not make

application of the favorable termination requirement contingent upon what would follow invalidation of the state decision."

2. Petitioners' incorrect insistence that *Heck* is concerned with protecting "state decisions" rather than with the validity of sentences and the legality of confinement leads them into other important mistakes. Relying on *Balisok*, petitioners argue that a Section 1983 claim results in the "invalidat[ion]" of a state judgment (and is therefore barred) when it could lead to a new hearing as opposed to outright reversal of the decision made in the challenged hearing. Pet. Br. 26-28. Here again, petitioners fail to focus on the crucial inquiry: the effect of the challenged hearing on the duration of lawful confinement. That issue, rather than the precise type of relief awarded, determines whether a claim is barred under *Heck*.

It is true that in some instances reversing a decision outright and vacating for a new hearing have the same result: they restore the prisoner to his status before the hearing. *Balisok* exemplifies this. In that case, had the plaintiff prevailed on his Section 1983 claim, the district court could have given the prison officials another chance to take away the inmate's good-time credits, this time using constitutionally acceptable procedures. But, even had that been the result, the prisoner's credits would have been restored unless the State took some further action. Thus, the immediate effect of the federal judgment would have been to undermine the legality of the prisoner's confinement and imply the invalidity of the sentence.

Thus, although it is true that under *Balisok* some federal decisions implying the need for a new hearing do fall within *Heck*'s bar, it is quite wrong for petitioners to suggest (at 28) that *any* claim implicating the right to a new hearing runs afoul of *Heck*.

II. DOTSON'S CLAIMS ARE NOT EXCLUSIVELY COGNIZABLE IN HABEAS CORPUS

Unable to show that *Heck*'s standard is satisfied, petitioners and their *amici* fall back on a different contention. They argue

that Dotson's claims are within the "traditional scope of habeas," and therefore, under *Preiser*, *must* be pursued under Section 2254 (without regard, that is, to whether "favorable termination" within the meaning of *Heck* is ever achieved). Pet. Br. 32; *Amicus* Br. of Alabama *et al.*, at 11 (arguing that this case is "governed by *Preiser*, not *Heck*"). That contention should be rejected because it is not fairly included in the questions presented in this case and because it lacks merit. In fact, most if not all of Dotson's *ex post facto* claims are not even cognizable under the habeas statute.

A. Petitioners' Argument That Dotson's Claims Are Absolutely Barred By *Preiser* Is Not Properly Before This Court

This Court's decisions in *Preiser* and *Heck*, though closely related, recognized distinct limitations on the ability of state prisoners to bring suit under Section 1983. In *Preiser*, the Court held that certain prisoner claims – those not only "challenging the fact or duration of * * * physical confinement itself" but also "seeking immediate release or a speedier release from that confinement" (411 U.S. at 498) – fall within the "core," *id.* at 489, or "heart," *id.* at 498, of habeas corpus, and therefore may not be brought in an action under 42 U.S.C. § 1983. *Preiser*'s bar on the litigation of "core" habeas corpus claims under Section 1983 is absolute; if a claim is barred by *Preiser*, then it is not – and never will be – cognizable under Section 1983.

The Court's decision in *Heck* v. *Humphrey* imposes a different limitation on prisoner claims. *Heck* applies only to claims that are not *Preiser*-barred. Under the rule adopted in *Heck*, certain claims brought by a prisoner under Section 1983 are barred unless and until the "underlying sentence or conviction has * * * been invalidated." 512 U.S. at 487. Thus, a claim that is *Heck*-barred may one day become cognizable if the prisoner achieves a "favorable termination."

The petition for certiorari in this case presented two issues concerning the meaning of *Heck*'s "favorable termination"

requirement. See Pet. i. First, petitioners asked this Court to determine whether "*Heck v. Humphrey*'s favorable termination requirement" applies to a prisoner's challenge to "parole proceedings," where "success by the prisoner on the claim would result in a new parole hearing and not necessarily guarantee earlier release from prison." *Ibid.* Second, petitioners asked the Court to decide whether a "federal court judgment ordering a new parole hearing 'necessarily implies the invalidity of' the decision at the previous parole hearing for purposes of *Heck*." *Ibid.* Petitioners did not raise any question about whether respondents' claims were barred by *Preiser*. Nor was the issue of a *Preiser* bar raised in or decided by the lower courts. Ordinarily, this Court does not address such questions. See S. Ct. Rule 14.1(a); R. STERN, ET AL., SUPREME COURT PRACTICE 419-21 (8th ed. 2002).[20]

Nor is the *Preiser* argument "fairly included" in the questions that were presented. S. Ct. Rule 14.1(a). If this Court were to accept petitioners' argument, there would be no need to reach the issues presented concerning the meaning of *Heck*'s "favorable termination" requirement. Moreover, a reversal on the basis of *Preiser* would give petitioners a *broader* victory than they achieved even in the district court. The district court, after all, dismissed respondents' claims under *Heck*, which means that respondents' claims may be refiled if and when they achieve "favorable termination." But, under petitioners' argument that *Preiser* forever bars respondents' claims,

[20] At the petition stage, sixteen States urged this Court to grant review of the questions presented because there was a compelling need to clarify "the 'necessarily implies' language of *Heck*." *Amicus* Br. of Alabama *et al.*, at 4; see also *id.* at 5-9 (citing three additional areas in which the circuits are divided because of disagreements over the meaning of *Heck*). Once review was secured, the *amici* States changed course entirely. They now tell this Court that this case is "governed by *Preiser*, not *Heck*," and they suggest that *Heck* should be understood as limited to *damages* claims. *Amicus* Br. of Alabama *et al.*, at 9, 11 (merits-stage brief). We note that, if the Court were to accept the *amici* States' proposed limitation on *Heck*, that would only provide another ground for affirming the court of appeals' judgment in Dotson's favor (since he is not seeking to recover damages).

respondents will never be able to state cognizable claims under Section 1983. For all of these reasons, the Court should decline to consider petitioners' argument that respondents' claims fall within the "core" of habeas and are thus barred by *Preiser*.

B. Dotson's Claims Do Not Fall Within The "Core," Or Even The Periphery, Of Habeas Corpus

In any event, petitioners are wrong in suggesting that Dotson's claims are exclusively cognizable in habeas. Contrary to petitioners' submission, habeas corpus is not the appropriate mechanism through which to seek relief that does not undermine the legal validity of a prisoner's confinement. *Preiser* sets forth a comprehensive description of what places a claim within the exclusive ambit of habeas; and that discussion makes clear that Dotson's request for a prospective declaration of his rights under the *Ex Post Facto* Clause (and an injunction relating to the conduct of future parole proceedings) does not fall solely within the habeas statute.[21] This is confirmed, moreover, by a wide range of lower court cases after *Preiser*.

Although habeas corpus is the proper mechanism for challenging the constitutionality of a criminal sentence, Pet. Br. 36, that truism is simply not implicated by the claims that Dotson has advanced in this case. Dotson asks merely to have the pre-1998 Ohio parole guidelines apply in his future parole hearings. He also seeks the benefit of the pre-1998 regulations that offer annual parole hearings after a prisoner's parole is denied for the second time. Such claims are not within the traditional scope of habeas, but are instead the proper subject for litigation under Section 1983.

[21] Petitioners overreach insofar as their argument is premised on the assumption that a claim cognizable under habeas is therefore *not* cognizable under Section 1983. This Court has certainly never said as much. To the contrary, both *Wilwording* v. *Swenson*, 404 U.S. 249, 251 (1971) (per curiam), and *Preiser* itself, 411 U.S. at 499, suggest that certain claims can properly be pursued either through habeas or Section 1983.

1. In *Preiser*, this Court described the elements that cause a sentencing-related challenge to sound in habeas. The Court explained that the "essence of habeas corpus is an attack by a person in custody upon the legality of that custody." 411 U.S. at 484; see 28 U.S.C. § 2254 (application for habeas relief may be entertained "*only* on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States") (emphasis added). The "traditional scope of habeas corpus" is to provide a "a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law." *Preiser*, 411 U.S. at 485. "Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power." *Fay* v. *Noia*, 372 U.S. 391, 430-31 (1963); cf. *In re Medley*, 134 U.S. 160, 173 (1889) ("[U]nder the writ of habeas corpus we cannot do anything else than discharge the prisoner from the wrongful confinement * * * ").

The purpose of habeas, in other words, is to provide a mechanism for those "in custody" to challenge the legal basis of their confinement. See *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention."); *Johnson* v. *Avery*, 393 U.S. 483, 485 (1969) ("the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom"); *Allen* v. *McCurry*, 449 U.S. 90, 98 n.12 (1980) (the "unique purpose" of habeas corpus is "to release the applicant for the writ from unlawful confinement"); *Townsend* v. *Sain*, 372 U.S. 293, 312 (1963) ("State prisoners are entitled to relief on federal habeas corpus *only* upon proving that their *detention* violates the fundamental liberties of the person.") (emphases added). The writ allows prisoners – or others subject to analogous restraints – to demonstrate that their confinement, whether at present or at some point in the future, is (or will become) unlawful. See *Peyton* v. *Rowe*, 391 U.S. 54, 58 (1965) (where available, habeas corpus assures "that a prisoner may require his jailer to justify the detention under the law").

Although habeas has expanded beyond its original role of assuring that "the committing court had been possessed of jurisdiction," *Preiser*, 411 U.S. at 485, this Court has never held that the scope of habeas extends beyond challenges that seek, in some direct sense, to "effect release from illegal custody." *Id.* at 486 n.7; see also *id.* at 486 ("traditional meaning and purpose of habeas corpus" is to "obtain release" from unlawful physical restraint). The Court has certainly never suggested that a constitutional claim of the sort made by Dotson here is properly cognizable under habeas corpus. Dotson seeks only to alter the standards that will apply to him in future parole hearings. He does not claim – nor could he – that applying the old guidelines would ensure his expedited release or undermine any aspect of the State's legal authority to keep him in confinement. By the same token, if Dotson prevails on his *ex post facto* claims, his victory would in no way imply that the State has been, or eventually will be, incarcerating him unlawfully. Nor would the federal decree that Dotson seeks require Ohio to take some remedial action in order to avoid having to hasten his release. In short, all of the hallmarks that cause a claim to fall within the special province of habeas are missing from this case.

2. This Court's cases applying *Preiser* make clear that Dotson's request for forward-looking injunctive relief lies beyond the scope of habeas. In *Wolff*, the Court held that inmates pursuing claims for prospective injunctive relief relating to procedures under Section 1983 were not required to proceed in habeas. See 418 U.S. at 553, 555. As petitioners recognize, this aspect of *Wolff* "remains good law" and indeed was "expressly reaffirmed in *Balisok*." Br. 41-42; see *Balisok*, 520 U.S. at 648. Similarly, in *Gerstein*, the Court held that a request for declaratory and injunctive relief – *i.e.* for the use of constitutionally adequate procedures in the future – fell beyond the reach of habeas, at least where "release was neither asked for nor ordered." 420 U.S. at 107 n.6. Dotson seeks no more than did the prisoners in *Wolff* and *Gerstein*, and thus properly brought his claims under Section 1983 rather than habeas corpus.

3. Despite these gaps between Dotson's claim and a traditional habeas claim, petitioners devote much space to arguing that a claim can fall within the ambit of habeas even though it will not inevitably result in earlier release. They observe that "claims resulting in rehearing can be brought through habeas" and that rehearing rather than immediate release is the norm in modern habeas practice. Pet. Br. 37-39. Thus, they say, Dotson's efforts to obtain a new parole review support the conclusion that his is an ordinary habeas claim. *Id.* at 39.

Even if Dotson's alleged claim to have the 2000 halfway recommendation redone were not moot, this argument would fail. Petitioners are wrong to suggest that rehearing is a defining feature of habeas corpus. Habeas courts fully serve the writ's objective of preventing "illegal custody," *Brown* v. *Allen*, 344 U.S. 443, 465 (1953), by giving state officials an opportunity to remove the feature of the confinement that rendered it illegal. Thus, although a federal court may order "curative proceedings" in lieu of immediate release (Pet. Br. 38), it does so *only after* identifying some constitutional defect in the conviction or sentence itself – a defect that if not remedied would render the fact or quantum of punishment unlawful. In those circumstances, rehearing simply offers the State a less intrusive way of correcting the error highlighted by the federal court. *Phifer* v. *Warden, United States Penitentiary, Terra Haute, Ind.*, 53 F.3d 859, 864-65 (7th Cir. 1995) ("Conditional orders are essentially accommodations accorded to the state. They represent a district court's holding that a constitutional infirmity justifies petitioner's release. The conditional nature of the order provides the state with a window of time within which it might cure the constitutional error."). If the State does not avail itself of that opportunity, however, its authority to deprive the prisoner of his liberty will necessarily be vitiated. See 2 R. HERTZ & J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 33.3 (4th ed. 2001).

Accordingly, the fact that many habeas cases result in rehearing certainly does *not* mean that any case in which

rehearing is sought is therefore a habeas case. What makes a habeas claim unique is not the ultimate fate of the prisoner, but instead the effect that a successful claim has on the validity of the conviction or sentence. Such a claim need not result in the prisoner's ultimately being released; to fall within what *Preiser* identified as the traditional scope of habeas, however, it must seek to undermine some aspect of the State's legal authority to confine the prisoner.

Dotson's case presents a fundamentally different situation. Nothing about his claim implies that he has a right to earlier release. Indeed, the constitutional error that led the parole hearing officer in 2000 to decline to recommend an earlier parole hearing is simply not one on which the legality of Dotson's confinement rests. In other words, neither the time that Dotson may lawfully be imprisoned nor the quantum of punishment that the State is entitled to impose on him will change as a result of the federal judgment that he seeks. That judgment will not put the State to a choice between remedying that error or shortening his sentence. The same simply cannot be said of a claim that falls within the core of habeas. See *Preiser*, 411 U.S. at 489 (at the core of habeas is a claim that "goes directly to the constitutionality of [the prisoner's] physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration"). In suggesting that bids for rehearing are at the heart of habeas, petitioners appear to have confused the cure with the disease.

4. Petitioners' reliance (Br. 38-39) on *Peyton* v. *Rowe*, 391 U.S. 54 (1965), and *Garlotte* v. *Fordice*, 515 U.S. 39 (1995), is similarly misplaced. In *Peyton*, the Court held that prisoners are "in custody" for purposes of the habeas statute when serving consecutive sentences, even if they have not yet begun to serve the sentence for the conviction they wish to challenge. *Garlotte* requires the same result when the prisoner serving consecutive sentences seeks to challenge the conviction underlying the sentence that ran *first* in the series and that has already expired.

Both cases involve challenges to the constitutionality of criminal convictions. Although *Garlotte* incidentally concerns parole eligibility – in that the challenged conviction served to postpone the date on which the prisoner became eligible for parole – the substantive habeas claim that the prisoner made had nothing to do with parole procedures, but instead asserted that his conviction was unconstitutionally obtained. See 515 U.S. at 42 n.1. This kind of direct attack on the validity of a conviction is of course the very essence of habeas, see *Daniels* v. *United States*, 532 U.S. 274, 381 (2001); *Preiser*, 411 U.S. at 489, and – as *Heck* makes clear – one unsuited for adjudication under Section 1983, see 512 U.S. at 487.

In the present case, by contrast, the issue is not whether Dotson is "in custody" – he surely is – but instead whether the substance of his claim is one cognizable under Section 2254. See 1 HERTZ & LIEBMAN, *supra*, § 8.1 (distinguishing between the two separate jurisdictional requirements of habeas: the "status" requirement that the petitioner be "in custody" and the "substance" requirement that the "petition challenge the legality of that custody"). In *Peyton* and *Garlotte*, only the custody issue was in dispute. But the fact that a prisoner can be deemed "in custody" on, and therefore challenge, a criminal conviction because of that *conviction's* effect on his parole eligibility certainly does not imply that an attack *not* mounted against a conviction or sentence – but instead against parole procedures themselves – comes within the scope of habeas.

5. Finally, petitioners are wrong in asserting (Br. 35) that the "weight of precedent" demonstrates that claims like Dotson's are "typically brought in habeas." In fact, most courts that have considered the question have held that prisoners who seek nothing more than an opportunity to make their case for parole should proceed through Section 1983 rather than habeas.

As petitioners acknowledge, since *Preiser* this Court has decided at least three cases in which prisoners used Section 1983 (not habeas) to press claims relating to parole proceedings similar to those made here. See Pet. Br. 40 (citing *Garner* v. *Jones*, 529 U.S. 244 (2000); *Board of Pardons* v. *Allen*, 482 U.S. 369 (1987); *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979)). Moreover, in *Wolff* this Court squarely held that a challenge to procedures used in revoking good-time credits is cognizable under Section 1983.

Petitioners attempt to brush aside the three cases involving parole procedures on the ground that because "no one challenged whether § 1983 was an appropriate vehicle in those cases," they do not stand for the proposition that parole claims are *properly* pursued through Section 1983. In almost the same breath, however, petitioners attach significance to this Court's cases in which parole-related claims were litigated through habeas corpus without the propriety of that approach being raised. Pet. Br. 35-36. Petitioners cannot have it both ways.[22]

Finally, the weight of lower-court authority in cases in which the issue actually *was* litigated supports the Sixth Circuit's decision here that parole-related claims that do not imply the prisoner's right to speedier release are properly litigated through Section 1983, not in habeas. Applying the habeas standards described in *Preiser*, most courts that have considered the issue have held that, as Judge Friendly put it, a "request for a new parole hearing * * * was [a] remedy outside habeas corpus, since it concerned the manner of parole decision making, not its outcome." *Williams* v. *Ward*, 556 F.2d 1143, 1150-51 (2d Cir. 1977); see also *ibid.* (noting that "the question of [the prisoner's] release and of the length of his confinement still lies within the sound discretion of the board, unlike *Preiser* where the restoration of good-conduct-time credits would have

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[22] Petitioners also overlook a good reason why silence might mean something different in the two contexts. In the habeas cases, there was no reason for state defendants to argue that Section 1983 was the proper vehicle (because, presumably, state remedies had already been exhausted). In contrast, there would have been *every* reason for state defendants in the Section 1983 cases involving parole procedures to contend that habeas (with its exhaustion requirement) was in fact the proper vehicle.

resulted automatically in the shortening of the [prisoner's] confinement").[23] These decisions support the proposition that Dotson's claims – because they would give him nothing more than at most an opportunity to make his case for parole, and do not question the State's ongoing authority to keep him in confinement – fall outside of the traditional domain of habeas corpus.[24]

III. POLICY CONCERNS DO NOT JUSTIFY EXPANDING THE *HECK* DOCTRINE TO COVER DOTSON'S SECTION 1983 CLAIMS

Petitioners final argument for reversal is an appeal to "concerns of comity and federalism" (Pet. Br. 43), which they say justify this Court's creation of additional restrictions on the ability of prisoners to bring civil rights claims challenging the conduct of parole proceedings. According to petitioners, adopting an expansive reading of the *Preiser* and *Heck* rules would prevent interference with prison administration, minimize federal intrusion into a "core state function," and allow disputes to be resolved on state-law (rather than federal constitutional) grounds. Pet. Br. 43-48. These arguments are overstated and

[23] See also *Clark* v. *State of Ga. Pardons and Paroles Bd.*, 915 F.2d 636, 638-39 (11th Cir. 1991); *Georgevich* v. *Strauss*, 772 F.2d 1078, 1087 (3d Cir. 1985) (en banc); *Walker* v. *Prisoner Review Bd.*, 694 F.2d 499, 501 (7th Cir. 1982); *Strader* v. *Troy*, 571 F.2d 1263, 1269 (4th Cir. 1978); *Haymes* v. *Regan*, 525 F.2d 540, 542 (2d Cir. 1975) *Bradford* v. *Weinstein*, 519 F.2d 728, 734-35 (4th Cir. 1975); cf. *Otey* v. *Hopkins*, 5 F.3d 1125, 1131 (8th Cir. 1993) (claim challenging process by which his clemency request was evaluated, but not asserting entitlement to clemency, is not cognizable through habeas because it does not attack the legality of the sentence).

[24] Although the three court of appeals cases discussed by petitioners (see Pet. Br. 26) did address whether parole claims could be brought under 28 U.S.C. § 2241 or § 2254, the issue of whether such claims were appropriately litigated in habeas in the first place (as opposed to Section 1983) was not presented. Moreover, the claims in those cases were directly focused – in a way that Dotson's plainly is not – on attacking decisions that actually went to the constitutionality of the prisoner's confinement and that, if successful, would imply the need for immediate or expedited release.

ignore the means that States already have at their disposal to ensure that parole officials have the opportunity to comply with the federal Constitution before being subjected to litigation under Section 1983.

As an initial matter, petitioners' argument overlooks that Congress has already provided the States with a means to ensure that parole officials will have the first opportunity to correct federal constitutional violations before being subjected to federal civil rights suits. As part of the Prison Litigation Reform Act of 1995 (PLRA), 110 Stat. 1321-73, Congress enacted an "invigorated * * * exhaustion prescription" (*Porter* v. *Nussle*, 534 U.S. 516, 524 (2002)) applicable to claims brought by state prisoners under Section 1983. See 42 U.S.C. § 1997e(a). Section 1997e(a) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 * * * by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." This Court has held that this provision applies broadly to all "inmate suits about prison life" brought under Section 1983, "whether they involve general circumstances or particular episodes," and imposes a mandatory exhaustion requirement even where the remedy sought by a prisoner is unavailable in the prison administrative process. *Porter*, 534 U.S. at 532; see *Booth* v. *Churner*, 532 U.S. 731, 739-41 (2001).

Petitioners bemoan the fact that Congress did not go further in the PLRA and require exhaustion of state *court* remedies. Pet. Br. 46. But Congress's decision not to go further strongly suggests that it would be inappropriate for this Court to impose such a requirement on the strength of petitioners' policy arguments. See *Patsy* v. *Board of Regents*, 457 U.S. 496, 512 (1982) ("It is not our province to alter the balance struck by Congress in establishing the procedural framework for bringing actions under 1983."). In any event, petitioners have offered no explanation of why such administrative tribunals would be less capable of vetting prisoner complaints than would state courts.

Congress has addressed the comity and efficiency concerns petitioners invoke, and it has given the States the first chance to correct their own errors.[25]

Next, petitioners suggest that the use of Section 1983 litigation to address problems of state prison administration represents a troubling intrusion into a core area of state sovereignty. But that argument proves too much. It overlooks the fact that prison conditions are frequently challenged under Section 1983. There is no reason to suppose that a Section 1983 suit challenging the State's parole procedures would represent a more serious intrusion on state sovereignty than would a suit challenging double-bunking and the training of prison guards. Yet the latter clearly *are* cognizable under Section 1983. Petitioners' argument about intrusions into core areas of state authority ignores this reality and is thus greatly exaggerated.

Finally, petitioners assert (Br. 45) that Section 1983 should yield when "there is a fair possibility that the underlying dispute can be resolved by state courts on state law grounds." But as this Court explained more than forty years ago, "[i]t is no answer that the State has a law which if enforced would give relief." *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961). "The federal remedy" created by Congress in enacting Section 1983 "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Ibid.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[25] Notably, Congress has also addressed petitioners' comity concerns by placing limits on the scope of prospective relief available to prisoners under Section 1983. See 18 U.S.C. § 3626(a)(1) (requiring courts to give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief").

Respectfully submitted.

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OCTOBER 2004

OHIO PAROLE BOARD DECISION

Name:	Inmate No.:	Date:
William Dotson	163897	4/25/02

Hearing Type:	Security Level:	Sentence:	Max/Eds/Est (circle one)
Rel. Contin. RIV	MED 3 3/01	Life	Life

1. The (offense) (parole violation) behavior has been rated as Category 13 because the offense behavior involved (Circle appropriate behavior):

Aggravated murder by jury conviction whereon o/a 7-18-80 the victim was killed as a result of a shotgun blast

Section No.(s): 201(A)

2. The Criminal History/Risk Score is 8 .

3. The Guideline Range is 390-L months.

4. Time served 249 m 1d mos + JTC 5m 21d mos = Total Time Served 255 mos. TPV Arrest Date: _____

5. Check if non-applicable X . The inmate has committed new felony criminal conduct in a prison facility that is rated as
Category __ because it involved: _____

Section No.(s):

The Rescission Criminal History/Risk Score is _____.

This conduct requires __ months be added to the guideline range.

6. Check if non-applicable _____

A. The inmate has committed _____ disciplinary infractions involving non-felonious threatening conduct against staff and/or non-felonious possession of a dangerous instrument (6-12 months per infraction to be added to the guideline range) that occurred on the following dates:

_____

B. The inmate has committed _____ disciplinary infractions involving possession or use of alcohol and/or possession or use of a controlled substance other than possession of a controlled substance with intent to distribute (3-6 months per infraction to be added to the guideline range) that occurred on the following dates:

_____

C. The inmate has committed _____ disciplinary infractions involving other misdemeanor conduct (0-6 months per infraction to be added to the guideline range) that occurred on the following dates:

_____

D. The inmate has committed _____ other significant disciplinary infractions (0-2 months per infraction to be added to the guideline range) that occurred on the following dates:

noted and not issued

This conduct requires _____ months to be added to the guideline range.

* * [End of page one of original form] * *

Name:	Inmate No.:	Date:
William Dotson	163897	4/25/02

7. Check if non applicable _X_. The aggregate guideline range is _____ months.

8. After review of all relevant factors and information presented.

_X_ A. A decision outside the guidelines at this consideration is not warranted. Therefore, the Board's decision is within the applicable guideline range.

___ B. Rescission guidelines were used to address rescission behavior since the last time setting hearing, and the aggregate guideline range is exceeded.

___ C. A decision (Above/Higher) (Below/Lower) the guidelines is warranted because:

___ (1) The Inmate's offense behavior involved the following specific (aggravating) (mitigating) factors:

___ (2) The Inmate is a (poorer) (more serious) (better) risk than indicated by his/her criminal history score for the following specific reasons:

___ (3) Other specific reasons:

List number of guideline ranges departed:
Vertical _____ Horizontal ____
List selected guideline range: _____ months

The continuance being reviewed would result in inmate serving 292 months which is well below the guideline range. Good institutional conduct and programming should be addressed at the next hearing.

9. Total time to be served at least 292 months.

---

10. Optional Outstanding Program Achievement

___ granted X not granted

(Note: The granting or denying of such credit is discretionary.)

The Board's decision includes a _____ month credit to outstanding program achievement as specified below:

---

11. Adjusted total time to be served _____ months.

12. Recommendation: No change: continue to 6-2005

13. Institutional conditions prior to PRD on next hearing: ___

---

14. Hearing Panel:

Board Member: s/MS Hearing Officer: s/DWD

Release on PRD is contingent on good institution behavior and/or reduction from maximum security status.

A PRD may be extended for a Class II violation when the case is reviewed at the PRD Pre-Release Review.

* * [End of page two of original form] * *

Supreme Court, U.S.
FILED
OCT 15 2004
OFFICE OF THE CLERK

No. 03-287

IN THE

Supreme Court of the United States

REGINALD WILKINSON, DIRECTOR, *et al.*,

Petitioners,

v.

WILLIAM DWIGHT DOTSON, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT ROGERICO J. JOHNSON

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QUESTIONS PRESENTED

1. May a state prisoner bring a suit under 42 U.S.C. § 1983 that seeks a new discretionary parole hearing (among other relief), rather than under the habeas corpus provision with its state-court exhaustion requirements, *see* 28 U.S.C. § 2254, when success on the § 1983 suit would not demonstrate that the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States," *id.* at § 2254(a)?

2. If the answer to Question No. 1 is "no," where Ohio has afforded Respondent a subsequent parole hearing that is not challenged in this case, may Respondent maintain a § 1983 suit seeking only prospective relief and nominal damages for constitutional violations that occurred in the earlier hearing, which no longer has any effect at all on his confinement?

PARTIES TO THE PROCEEDINGS

The Petitioners are Reginald Wilkinson, the Director of the Ohio Department of Rehabilitation and Correction, and Margaret Ghee, the former chair of the Ohio Parole Board. The Respondents are Rogerico J. Johnson and William D. Dotson, both prisoners in custody of the Ohio Department of Rehabilitation and Correction.

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BRIEF FOR RESPONDENT JOHNSON

The *en banc* majority of the Court of Appeals for the Sixth Circuit correctly determined that Respondent Johnson may proceed with his § 1983 claims challenging the guidelines and procedures employed in his April 1999 parole hearing.

Respondent's claims are not required to be brought under the habeas corpus provision, 28 U.S.C. § 2254(a). This is because parole-determination decisions are highly discretionary (as Petitioners admit (Pet. Br. at 6)) and, therefore, a successful challenge to a parole proceeding carries no necessary consequence for the legality of the prisoner's confinement. And, in all events, Respondent Johnson's § 1983 challenge to the April 1999 parole hearing could have no bearing whatsoever on the legality of his present or future confinement, because the Ohio Parole Board has subsequently afforded Johnson a new parole hearing (in July 2001) that is not the subject of this suit.

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 4a - 35a) was issued on May 19, 2003 and is reported at 329 F.3d 463 (6th Cir. 2003).

The judgment of the United States District Court for the Northern District of Ohio (Pet. App. 56a), as well as the accompanying opinion (Pet. App. 52a - 55a), were issued on July 18, 2000. The opinion is unreported.

JURISDICTION

The *en banc* opinion of the United States Court of Appeals for the Sixth Circuit was issued on May 19, 2003. The petition for writ of certiorari was filed on August 18, 2003, and granted on March 22, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(l).

STATUTES INVOLVED

Section 1983 of Title 42 provides, in pertinent part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Section 2254 of Title 28 provides, in pertinent part, that:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
>
> > (A) the applicant has exhausted the remedies available in the courts of the State; or
> >
> > (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

STATEMENT

A. Parole

Parole is an administrative or executive action to allow a prison inmate "to serve the remaining part of his prison term

outside prison with supervision and within the community."[1] 1 NEIL P. COHEN, THE LAW OF PROBATION & PAROLE § 4:1, at 4-2 (2d ed. 1999). It operates in the context of an indeterminate sentencing scheme, under which a court imposes a minimum and maximum sentence, but does not set a specific release date within that range. Once the inmate has served the minimum sentence, he becomes eligible for parole consideration. *See* ARTHUR W. CAMPBELL, LAW OF SENTENCING § 17:7 (2d ed. 1991). If parole is granted, the parolee is permitted to reenter the community and to serve the remainder of the sentence under conditions imposed by the parole board. COHEN, *supra*, § 4:1. Ohio employs an indeterminate sentencing system, along with parole, for most crimes committed before July 1, 1996. Under this system, an inmate serving time for a felony is typically eligible for parole at the expiration of the minimum term. Ohio Rev. Code Ann. § 2967.13(A).

In Ohio, as in most states employing parole, whether parole should be granted is generally a discretionary decision vested in the parole board. *See, e.g., Inmates of Orient Correctional Inst. v. Ohio State Adult Parole Auth.*, 929 F.2d 233, 236 (6th Cir. 1991). Moreover, as this Court has stated with regard to Nebraska's parole process:

> The parole-release decision . . . depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experiences with the difficult and sensitive task of evaluating the advisability of parole release. Unlike the [parole] revocation decision, there is no set of facts which, if shown, mandate a decision

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[1] *See, e.g., United States v. Einspahr*, 35 F.3d 505, 507 (10th Cir. 1994) (parole does not terminate the sentence that the prisoner is serving; supervision in a prison setting is replaced by supervision by parole and probation authorities).

> favorable to the individual. The parole determination, like a prison transfer decision, may be made "for a variety of reasons and often involve[s] no more than informed predictions as to what would best serve [correctional purposes] or the safety and welfare of the inmate."

Greenhnoltz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 9-10 (1979); *id.* at 10 (parole decision turns on a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done").

Although the mix of factors that go into a parole-release decision varies among the states – and even from case-to-case within a state – certain specific factors are almost always considered, including the inmate's: (i) criminal record; (ii) institutional record and adjustment (including participation in rehabilitative and community release programs); (iii) achievements while incarcerated, including educational achievements; (iv) physical, mental and moral rehabilitation; and (v) post-release parole plans. *See* COHEN, *supra*, § 4:32. This is true in Ohio, where the Parole Board's regulations set forth a non-exhaustive list of some 16 separate factors that may be considered in making the parole decision.[2] Ohio Admin. Code § 5120:1-1-07(C)(1) - (16) (2002).

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[2] The 16 permissible factors considered by the Parole Board are:

(a) the inmate's ability and readiness to assume obligations and undertake responsibilities, as well as the inmate's goals and needs;

(b) the inmate's family status, including whether his relatives display an interest in him or whether he has other close and constructive association[s] in the community;

(c) the type of residence, neighborhood, or community in which the inmate plans to live;

(d) the inmate's employment history and his occupational skills;

(e) the inmate's vocational, educational, and other training;

Although some statement of reasons for a parole denial is customary in most states, few require that it be precise or specific. *See* COHEN, *supra*, § 6:24. And because the ultimate decision is highly discretionary, the weight actually afforded the particular factors is "virtually impossible to establish" in any particular case. *See id.* § 4:32, at 4-62. In Ohio, the Parole Board is required to give the inmate the actual decision "verbally and in writing"; a more specific written explanation is not required unless the Parole Board's decision is contrary to the established guidelines. ODRC Policy 501-36 § VI(D)(4) (Pet. Br. at S-16).

A recent trend in parole is the use of written guidelines by parole boards to assist in making parole-release decisions.

(f) the adequacy of the inmate's plan or prospects on release;

(g) any recommendations made by the sentencing courts;

(h) the inmate's conduct during his term of imprisonment;

(i) the inmate's behavior and attitude during any previous experience of probation, furlough, parole, or other administrative release and the recency of such experience;

(j) the availability of community resources to assist the inmate;

(k) the nature of the offense for which the inmate was convicted;

(l) the inmate's pattern of criminal or delinquent behavior prior to the current term of imprisonment;

(m) the physical and mental health of the inmate as they reflect upon the inmate's ability to perform his plan of release;

(n) the presence of outstanding detainers against the inmate;

(o) any recommendations made by the staff of the department of rehabilitation and correction or any of its agencies; and

(p) any other factors which the board determines to be relevant . . . .

Ohio Admin. Code § 5120:1-1-07(C)(1) - (16) (2002). Notably, the Model Penal Code sets out a similar non-exhaustive list of factors that should be considered in making parole-release decisions. *See* Model Penal Code § 305.9(2) (A.L.I. 1985).

See COHEN, *supra*, § 4:34. As is currently the case in Ohio,[3] these guidelines typically take the form of a chart that specifies the approximate parole release date for prisoners whose crimes and personal histories fit predetermined categories. *Id.* Usually the categories rate both the severity of the offense and various dimensions of the offender's history to determine the likelihood that the inmate will commit additional crimes. Ohio implemented such a two-factor grid system in 1998 (the "1998 Guidelines") and has applied it to all parole hearings after that date.

"Once this information is quantified, the board has a numerical score which determines the inmate's presumptive parole date. The board is usually given the discretion to depart from the guidelines in unusual cases when aggravating or mitigating factors make departure appropriate."[4] *See* COHEN, *supra*, § 4:34. This is true in Ohio, where the intersection on the grid yields a suggested range of months, which, as Petitioner admits, the Parole Board "usually follows." (Pet. Br. at 7.)

B. Proceedings Below

Respondent Rogerico Johnson is serving three indefinite sentences: one for his conviction in 1992 for aggravated robbery, a second for his conviction in 1992 for certain offenses related to his attempt to grab an officer's gun at a hearing contesting the robbery conviction, and a third for his 1998 conviction for assaulting a prison guard.

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[3] Ohio's parole guidelines can be accessed online at: http://www.drc.state.oh.us/web/Guideline%20Manual04.pdf (last visited October 14, 2004).

[4] Among other purposes, these guidelines help to "minimize disparity in sentencing and in parole release decisions by providing uniform parole release dates for similar offenders," and to "structure the parole board's exercise of discretion to release inmates." COHEN, *supra*, at § 4:34.

On April 9, 1999, Respondent Johnson had his first parole hearing. Parole was denied. Numerous irregularities occurred in the course of the April 1999 parole hearing. For one, the Parole Board applied parole guidelines that it implemented in April 1998 – *i.e.*, the 1998 Guidelines – which was well after the crimes for which Respondent was convicted. And, as Petitioners acknowledge, inmates "convicted of more serious crimes [like Respondent] generally serve longer periods of incarceration under the 1998 Guidelines than they did under the prior guidelines." (Pet. Br. at 7.)

In addition, numerous procedural violations occurred during the April 1999 parole hearing. For example, the hearing was conducted by one member of the Ohio Parole Board, despite regulations requiring two members to preside over that hearing. *See* Ohio Admin. Code § 5120:1-1-11(C) (recommendations for or against release can only be made by "a panel consisting of one or more members of the Parole Board *and* one or more Parole Board hearing officers").

Likewise, Respondent was not permitted to speak, be heard or otherwise interact with the lone hearing officer during his April 1999 hearing – actions also in violation of the Parole Board's regulations. *See id.* § 5120:1-1-07(B)(7) (providing that at the hearing the parole panel shall consider, among other things, "[w]ritten or oral statements by the inmate"). And the Parole Board decision delivered to Respondent after the hearing afforded no opportunity to provide comment, remarks or rebuttal to the parole decision.

Thus, Respondent had no opportunity to meaningfully participate in the parole-decision process, either before or after the Parole Board's decision. This proved to be a matter of some consequence, because Respondent later discovered that his parole file was riddled with errors that he was unable to dispute before a parole decision was made. For example, his file contained findings of misconduct for which he had never been charged or disciplined.

Inquiries made by Respondent following his hearing and denial of parole revealed that many other prisoners in Ohio penitentiaries were experiencing quite violations of their rights. Many who committed their crimes before April 1998 were having their parole decisions made on the basis of the 1998 Guidelines. And many other inmates had also been subjected to procedural improprieties like those Respondent experienced during his April 1999 hearing.

Based upon this additional information, on April 26, 2000, Respondent, acting *pro se*, filed a complaint against Margaret Ghee, Chairperson of the Ohio Parole Board, under 42 U.S.C. § 1983. In his complaint, Respondent alleged that application of the 1998 Guidelines to him violated his constitutional guarantee against *ex post facto* laws,[5] and that the procedural irregularities that occurred during the April 1999 hearing violated his constitutional rights to due process and equal protection of the laws. Respondent sought individual and class-wide prospective injunctive relief on all of these claims,[6] as well as retroactive injunctive relief in the form of an order granting him a new hearing based on the deficiencies alleged in the hearing of April 1999.[7] Respondent's complaint did not name the correctional facility warden as a defendant, nor did Respondent challenge

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[5] U.S. CONST. art. I, § 10 ("No State shall . . . pass any Bill of Attainder, ex post facto Law . . . ."). *See generally* Wayne Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261 (1998).

[6] Included with Respondent's *pro se* complaint were affidavits from Ohio inmates that detailed the alleged procedural irregularities that Respondent sought to rectify on his and their behalf. (J.A. 55-73.)

[7] Respondent also asserted in the court below that he had a right to recover nominal damages for the violations of his rights at the April 1999 hearing, and Petitioner did not dispute this assertion. *See* Supplemental Brief of Plaintiff/Appellant Rogerico Johnson to the Sixth Circuit, at 2 n.2 (dated Oct. 25, 2002).

the legality of his custody or claim entitlement to immediate release.

Before an answer was filed, on July 18, 2000, the district court *sua sponte* dismissed Respondent's complaint under 28 U.S.C. § 1915(e)(2).[8] The district court determined that none of Respondent's claims was cognizable under § 1983, but could only be brought as habeas corpus claims pursuant to 28 U.S.C. § 2254(a) after Respondent first exhausted his state-court remedies. Respondent timely filed a notice of appeal.

After Respondent filed *pro se* a hand-written appellate brief, the Sixth Circuit appointed counsel to represent him in his appeal. With the assistance of counsel, Respondent filed an additional brief, arguing that the district court erred and that Respondent's challenges to the parole proceedings are cognizable under § 1983, because they do not necessarily imply the invalidity of his continued confinement.

A panel of the Sixth Circuit heard the case on June 18, 2002. Before a decision was rendered, a separate Sixth Circuit panel decided co-Respondent Dotson's appeal in a published opinion. *Dotson v. Wilkinson*, 300 F.3d 661 (6th Cir. 2002). Thereafter, the Sixth Circuit *sua sponte*

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[8] Section 1915(e)(2) provides:

> Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that –
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> (A) the allegation of poverty is untrue; or
>
> (B) the action or appeal –
>
> (i) is frivolous or malicious;
>
> (ii) fails to state a claim on which relief may be granted; or
>
> (iii) seeks monetary relief against a defendant who is immune from such relief.

consolidated the appeals and ordered *en banc* argument, which was presented on December 11, 2002.[9]

Fifteen months after the complaint had been filed, and twelve months after it was dismissed, on July 27, 2001, Respondent was afforded a second parole hearing, at which parole was again denied. (This parole decision is reproduced as an addendum to this brief.) While the fact of this hearing, and its result, were made known to the court below,[10] Respondent has not in this case undertaken to challenge either the result of this second hearing, or the procedures followed therein.

On May 19, 2003, the Sixth Circuit issued its *en banc* decision, holding by a vote of 6 to 4 that Respondent Johnson's claims are cognizable under § 1983.[11] (Pet. App. 5a-6a.) In arriving at this holding, the majority first recognized that, "[u]nder Ohio law, parole is discretionary," so "the impact the new hearings would have on Dotson['s] and Johnson's parole or release is indeterminate." (*Id.* at 17a.) The majority then reinforced the degree to which the outcome of a new parole hearing would be uncertain by observing that:

> [n]ot every procedural defect necessarily has an impact on the ultimate outcome of a procedurally defective hearing. The remedying of many procedural defects will not cause any different outcome at all, much less "necessarily imply" that the prisoner should be released immediately or

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[9] The Sixth Circuit ordered briefing and argument on the "common issue of whether an Ohio state prisoner can use 42 U.S.C. § 1983 to seek damages or a new parole hearing on the ground that an earlier hearing was procedurally deficient." (J.A. 8.)

[10] *See* Supplemental Brief of Plaintiff/Appellant Rogerico Johnson to the Sixth Circuit, at 2 n.2 (dated Oct. 25, 2002).

[11] Neither the majority opinion nor the dissent made any mention of Respondent's July 2001 parole hearing.

> sooner than he would have been released absent the challenge.

(Pet. App. 19a.)

Based on these considerations, the majority set forth what it called "the clearest statement of the standard" it adopted:

> [w]here a prisoner does not claim immediate entitlement to parole or seek a shorter sentence but instead lodges a challenge to the procedures used during the parole process as generally improper or improper as applied in his case, and that challenge will at best result in a new discretionary hearing the outcome of which cannot be predicted, we hold such a challenge cognizable under section 1983.

(Pet. App. 19a-20a.) The majority opinion then concluded by observing that, although a prisoner challenging the parole procedures likely does hope that success on his claim may yield a speedier release from incarceration, that alone is not enough to bar a § 1983 suit:

> [A]n incarcerated person obviously seeks to be released from confinement. A prisoner cares not a whit as to how that happens, but this court must care. We do not read into a legal claim what we know on a human level is realistically there: a prisoner who objects to his confinement may nevertheless raise a section 1983 claim, a legal claim, if his due process rights have been violated and the challenge does not *necessarily* implicate the invalidity of his continued confinement. Johnson and Dotson are not requesting that the parole board make a different decision, although we understand that they wish it would; they are merely requiring that the parole board comply with the law in making that decision.

(Pet. App. 20a.)

The dissent disagreed that Respondent Johnson's challenge is cognizable under § 1983, stating:

> [t]he majority . . . glosses over what I believe is the Supreme Court's actual rule – that it is the *judgment* of the

> administrative body (in this case, the parole board) whose validity may not be questioned by a § 1983 action, regardless of the judgment's effect on the length of the prisoner's underlying conviction or sentence.

(Pet. App. 21a.) Applying its proposed rule to Respondent Johnson's claims, the dissent reasoned "there is no way to characterize the nature of Johnson's challenge as anything other than a claim that necessarily implies the invalidity of a prior state judgment" – *i.e.*, the April 1999 Parole Board decision. (Pet. App. 33a.) As a result, the dissent asserted that Respondent Johnson's § 1983 suit should be barred.[12]

The dissent reached this conclusion based on its view of two Supreme Court decisions: *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Edwards v. Balisok*, 520 U.S. 641 (1997). As the dissent saw it:

> In *Heck*, ... [t]he Court was suggesting that the real problem was not that the prisoner's § 1983 action would necessarily get him out of jail sooner, but rather that the federal courts must not allow the use of § 1983 to imply the invalidity of *any* state criminal judgments relating to the length of a prisoner's incarceration.

(Pet. App. 23a.) The dissent then reasoned that in *Balisok*, "the Supreme Court extended this principle" to bar § 1983 suits that, if successful, would imply the invalidity of a

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[12] Notably, the dissent would have reached the opposite conclusion with respect to Respondent Dotson's claim, which it believed is cognizable under § 1983. (Pet. App. 31a.) Respondent Dotson's claim challenged the decision in his halfway parole review to retroactively apply Ohio's 1998 Guidelines to his *future* parole hearings. Relying on the fact that a halfway parole hearing does not decide the grant or denial of parole, the dissent reasoned that Dotson's § 1983 claim could proceed because "[t]he nature of Dotson's claim . . . does not necessarily imply the invalidity of any judgment by an administrative body that he is or is not entitled to parole." (Pet. App. 28a.)

prison administrative hearing that somehow relates to the length of a prisoner's incarceration. (*Id.*)

Petitioners filed a petition for certiorari on August 18, 2003, which this Court granted on March 22, 2004.

SUMMARY OF ARGUMENT

This Court has articulated a bright-line rule that governs whether a state-prisoner lawsuit may be brought under 42 U.S.C. § 1983, or whether it must be brought under the federal habeas statute, 28 U.S.C. § 2254, which contains stringent state-court exhaustion requirements. When a prisoner's § 1983 challenge seeks a judgment at odds with his conviction or with the State's calculation of time to be served in accordance with the underlying sentence, then he must proceed first in habeas and has no cognizable § 1983 claim unless and until he shows that the underlying conviction or sentence has been terminated in his favor. If however, a prisoner's § 1983 action would not, if successful, demonstrate the unlawfulness of either his conviction or the duration of his sentence, the claim may proceed and need not be brought in habeas.

1. Respondent Johnson's complaint falls well outside the margins of habeas corpus. Respondent challenges neither his conviction, nor the legality of his continued or expected confinement. His challenge to the parole guidelines and procedures employed in the April 1999 parole hearing, if successful, would in no way necessarily affect the duration of his confinement, grant him immediate or speedier release, or entitle him to relief that he otherwise could obtain through a habeas challenge. This is because, as Petitioners admit, parole is a highly discretionary decision that involves an ad-hoc weighing of numerous objective and subjective factors. Thus, a request for a new parole hearing would, if granted, carry no necessary effect on the prisoner's term of incarceration.

2. Respondent's § 1983 action is also cognizable for another, equally compelling reason: He has been afforded a

subsequent parole hearing (in July 2001) that supersedes the April 1999 parole decision. The present § 1983 action makes no claims or assertions at all about the subsequent July 2001 parole denial, and the original request for a new parole hearing based on the violations in the April 1999 hearing is now moot. What is more, the remaining live issues in this case – Respondent's request for prospective injunctive relief and a claim for nominal damages based on the conduct of the April 1999 hearing – can have no effect upon the fact or term of Respondent's incarceration. For this reason, too, Respondent Johnson's § 1983 claim may go forward.

3. This Court should resist Petitioners' invitation to extend the bright-line rule developed through *Preiser*, *Heck* and their progeny, to now bar every § 1983 prisoner challenge that in some way involves challenges to parole hearings. Petitioners' chief argument rests on the flawed premise that parole decisions constitute "sentences" (and, thus, must be challenged in habeas). But they do not. Rather, it has long been held that since parole merely constitutes relief from a sentence already imposed, a denial of parole is in no way the imposition of a "sentence," as Petitioners argue. Indeed, Petitioners gloss over, or ignore altogether, the constitutional significance of treating parole determinations as sentencing decisions. For example, the Constitution entitles criminals at sentencing to be represented by counsel, and, thus, to treat parole decisions as a phase of sentencing would require that prisoners be afforded counsel for such hearings.

4. Petitioners are incorrect, too, in suggesting that *Heck* bars (or should be extended to bar) any prisoner § 1983 challenge that could nullify a state administrative decision relating in any way to his confinement. By this assertion, Petitioners seek to refocus the *Heck* inquiry in a manner that renders irrelevant a lawsuit's necessary effect on the legality of the term of incarceration. But there is no basis to alter the clear test laid out in *Heck*. And, contrary to Petitioners'

assertion and the dissenting opinion below, the fact that Respondent challenges a state administrative proceeding that happens to relate to parole does not – alone – bring that claim within *Heck*'s preclusive reach.

5. Lastly, concerns of "comity and federalism" do not support the expansion of *Heck*, and the resulting limitation on § 1983, as the Petitioners urge. Any federal interest in deferring to either state prison management or state courts is not a basis for extending the *Heck* bar to prohibit § 1983 suits that would not necessarily shorten a prisoner's confinement nor alter the legality of his custody. Indeed, the Prison Litigation Reform Act (PLRA) already accords significant deference to state administrative decisions and requires prisoners to exhaust state remedies – as Respondent did here – before bringing suit under § 1983.

ARGUMENT

Both the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983, and the federal habeas corpus statute, 28 U.S.C. § 2254, provide state prisoners with "access to a federal forum for claims of unconstitutional treatment at the hands of state officials." *Heck v. Humphrey*, 512 U.S. 477, 480 (1994). However, the two statutes "differ in their scope and operation," which makes it critical to determine which provides the correct vehicle for a state prisoner's suit. *Id.* at 480.

Section 1983 provides broad jurisdiction for federal courts to prevent and redress violations of federal constitutional rights by state actors: "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). It generally allows state prisoners to bring suit without first exhausting their state-court remedies, *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 509 (1982), and it empowers federal

courts to redress past or threatened violations with the full panoply of remedies – damages, retroactive injunctive relief, and prospective injunctive relief, 42 U.S.C. § 1983 (expressly authorizing both legal and equitable relief); *see generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.11 (3d ed. 1999).

On the other hand, the habeas corpus statute is narrower in scope and operation, affording federal court jurisdiction over claims only by "person[s] in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody."[13] *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). It authorizes federal court jurisdiction over state inmate claims which, if successful, would require the federal court to find that the prisoner is (or in the future will be) in custody in violation of the Constitution or other federal laws. *See Peyton v. Rowe*, 391 U.S. 54, 58 (1968). Critically, before bringing a habeas action, a state prisoner must first "exhaust[] the remedies available in the courts of the State." 28 U.S.C. § 2254(b).

While the broad language of § 1983 on its face covers all state prisoner suits alleging violations of federal rights, even those that are cognizable in habeas, the Court has held that "despite the literal applicability of its terms," § 1983 has no application where "the specific federal habeas corpus statute, explicitly and historically designed to provide the means for

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[13] *See Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2717-18 (2004) ("We summed up the plain language of the habeas statute over 100 years ago in this way: '[T]hese provisions contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, *that he may be liberated if no sufficient reason is shown to the contrary.*'" (quoting *Wales v. Whitney*, 114 U.S. 564, 574 (1885)) (emphasis added)).

a state prisoner to attack the validity of his confinement," applies. *Preiser*, 411 U.S. at 489. To prevent state prisoners from using § 1983 to circumvent the habeas corpus exhaustion requirement, this Court has undertaken, in a series of decisions, to define the class of cases in which an action in habeas is either the only available avenue of relief, or must be successfully pursued as a prerequisite to a money-damages claim under § 1983.

I. THIS COURT HAS CONSISTENTLY PERMITTED § 1983 PRISONER CHALLENGES THAT, IF SUCCESSFUL, WOULD NOT NECESSARILY UNDERMINE THE LEGALITY OF THE PRISONER'S CONVICTION OR TERM OF INCARCERATION

In *Preiser v. Rodriguez*, this Court set out guiding principles regarding when state prisoner claims that are included within the broad reach of § 1983 must nonetheless be brought in habeas. The *Preiser* inmates alleged "that the deprivation of their good-conduct-time credits was causing or would cause them to be in illegal physical confinement, *i.e.*, that once their conditional-release date had passed, any further detention of them in prison was unlawful." 411 U.S. at 487. As Petitioners correctly note in their brief, "*Preiser* determines whether a prisoner's claim falls within that region [of claims that must be brought in habeas] by examining the relief sought." (Pet. Br. at 32.) *Preiser* held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, *and the relief he seeks is a determination that he is entitled to immediate release or a speedier release* from that imprisonment, his sole federal remedy is a writ of habeas corpus." *Id.* at 500 (emphasis added).

In reaching that holding, the *Preiser* Court first observed that "[i]t is clear" from the language of § 2254(a) "that the traditional function of the writ is to secure release from illegal custody," *id.* at 484, that is, "custody in violation of

the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a). The *Preiser* Court confirmed this by examining "the common-law history of the writ," concluding that first in England, and then in this country, habeas has been a mechanism to "inquire into illegal detention with a view to an order releasing the petitioner."[14] 411 U.S. at 484 (quoting *Fay v. Noia*, 372 U.S. 391, 399 n.5 (1963)). The Court further explained that, "over the years, the writ of habeas corpus evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law, even though imposed pursuant to conviction by a court of competent jurisdiction." *Id.* at 485. Indeed, the inmates in *Preiser* were seeking just such relief. Their assertions of constitutional violations, if successful, would have entitled them to immediate or earlier release from confinement – the very relief specially reserved for the writ of habeas corpus.

The next year, in *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court addressed a Nebraska state prisoner class-action under § 1983 which challenged, *inter alia*, the procedures used in prison disciplinary hearings resulting in

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[14] Indeed, the Court even set out examples of unlawful detentions subject to habeas corpus review, where success on the inmate's petition necessarily would result in immediate or speedier release:

> Thus, whether the Petitioner's challenge to his custody is that the statute under which he stands convicted is unconstitutional; that he has been imprisoned prior to trial on account of a defective indictment against him; that he is unlawfully confined in the wrong institution; that he was denied his constitutional rights at trial; that his guilty plea was invalid; that he is being unlawfully detained by the Executive or military; or that his parole was unlawfully revoked, causing him to be reincarcerated in prison – in each case his grievance is that he is being unlawfully subjected to physical restraint, and in each case habeas corpus has been accepted as the specific instrument to obtain release from such confinement.

411 U.S. at 486 (citations and footnote omitted).

the withdrawal of good-time credits. The state prisoners requested both the restoration of good-time credits, and prospective injunctive relief and damages based on the procedures employed in the prison disciplinary hearings. Following *Preiser*, the Court held that to the extent "the state prisoners were challenging the very fact or duration of their confinement and were seeking speedier release, their sole federal remedy was by writ of habeas corpus." *Wolff*, 418 U.S. at 554. On the other hand, the Court reasoned that the challenge to the hearing procedures were appropriately reviewed under § 1983, and that the court below could "determine the validity of the procedures for revoking good-time credits and . . . fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good-time already cancelled." *Id.* at 555 (footnote omitted).

In *Heck v. Humphrey*, the Court faced a situation not literally covered by *Preiser*'s rule of looking to the relief sought by the inmate. In *Heck*, an inmate sought damages under § 1983 for various alleged violations of constitutional rights committed by state officials in the investigation leading to the inmate's conviction. Notwithstanding the fact that the inmate's complaint did not include an overt challenge to the legality of his continuing incarceration, the Court concluded that the suit should not be allowed to go forward under § 1983 if its necessary consequence would be to collaterally attack his conviction and demonstrate the illegality of the inmate's continued confinement:

> Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal

judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

512 U.S. at 487 (emphasis in original, footnotes omitted).

This rule is the logical and necessary corollary to the holding in *Preiser* that a state prisoner's sole federal remedy is a habeas action when "he seeks . . . a determination that he is entitled to immediate release or a speedier release." *Preiser*, 411 U.S. 500. The *Heck* rule ensures that, just as a prisoner may not bring a § 1983 action that would, if successful, directly entitle him to an immediate or speedier release from custody, so too a prisoner may not indirectly avoid the habeas exhaustion requirements by bringing a § 1983 damage suit if success on the suit would "necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement." *Heck*, 512 U.S. at 486. In this way, both *Preiser* and *Heck* are in keeping with the text of the habeas provision, because the effect of both holdings is to channel a state prisoner's suit into habeas if success in the suit would actually demonstrate, regardless of the relief sought, "that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

Subsequently, in *Edwards v. Balisok*, 520 U.S. 641 (1997), the Court addressed the § 1983 action of an inmate who sought declaratory and prospective injunctive relief, and damages, based upon alleged violations of due process in a prison disciplinary proceeding that resulted in the loss of 30 days' good-time credit. The inmate expressly excluded from his prayer for relief restoration of the good-time credits, and reserved the right to seek that relief in an appropriate forum, via a habeas action. *Id.* at 644. But the Court applied the central teaching of *Heck* to this § 1983 challenge to a prison administrative decision that revoked good-time credits (and, thus, that resulted in an extension of a prisoner's term of incarceration). *Id.* at 646. While acknowledging that some

procedural challenges, even if successful, may not necessarily lead to invalidation of a decision to revoke good-time credits, the Court ruled that this plaintiff's § 1983 claim of deceit and bias by the state administrative decisionmaker would, if successful, necessarily demonstrate the invalidity of the withdrawal of good-time credits and the resulting extension of his term of incarceration. Accordingly, this Court concluded that the inmate's § 1983 deceit-and-bias claim was *Heck*-barred. *Id.* at 647-48.

The Court's unanimous decision last term in *Muhammad v. Close*, 124 S. Ct. 1303 (2004), reemphasized that not all inmate challenges to prison administrative proceedings are barred by *Heck*. In that case, the inmate brought a § 1983 suit after receiving administrative discipline resulting from misconduct relating to a confrontation with a guard. *Id.* at 1305. The inmate's amended complaint challenged neither the misconduct finding nor the subsequent disciplinary action. Instead, he sought only compensatory and punitive damages for his pre-hearing detention. *Id.*

In reversing dismissal of the suit, the Court again emphasized that § 1983 challenges that "threaten[] no consequence for [a prisoner's] conviction or the duration of his sentence" may proceed. *Id.* at 1304 (footnote omitted). This is so because "[t]here is no need to preserve the habeas exhaustion rule and no impediment under *Heck* in such a case." *Id.* at 1304-05. The Court corrected the lower court's "mistaken view expressed in Circuit precedent that *Heck* applies categorically to all suits challenging prison disciplinary proceedings," because such determinations "do not as such raise any implication about the validity of the underlying conviction, and although they may affect the duration of time to be served (by bearing on the award or revocation of good-time credits) that is not necessarily so." *Id.* at 1306. Thus, the inmate's action could proceed under § 1983 because it did not allege claims cognizable in habeas:

> [H]e raised no claim on which habeas relief could have been granted on any recognized theory, with the consequence that *Heck*'s favorable termination requirement was inapplicable.

Id.[15]

What emerges from these cases is a coherent distinction between claims that must be brought first in habeas corpus, and claims permissibly brought at the outset under § 1983. That distinction turns on whether an inmate's claims, if successful, would necessarily alter the legality of his term of custody, such that absent further action by the state (*e.g.*, a new conviction, a new parole-revocation hearing, a new prison-disciplinary hearing)[16] the prisoner would be entitled to immediate or speedier release from custody.

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[15] Similarly, the Court's decision last term in *Nelson v. Campbell*, 124 S. Ct. 2117 (2004), confirmed the viability of a § 1983 suit that does not challenge the legality of a sentence – there a death penalty. The inmate brought a § 1983 challenge alleging that the use of a "cut down" procedure to gain pre-execution venous access was unconstitutional. The Court held that the claim was cognizable under § 1983 because it would not demonstrate the illegality of the state's death penalty, as alternative means existed to carry out the sentence. *Id.* at 2125.

[16] Although habeas jurisdiction is triggered where the prisoner's constitutional claim would, if successful, necessarily yield an immediate legal effect on his term of custody, there need not be a guarantee that the prisoner will be immediately or sooner released. For example, where an unconstitutional conviction is overturned, the state may retry the defendant; where a procedurally defective parole-revocation decision is thrown out, the state may have a rehearing and again revoke the prisoner's parole; and, where a defective prisoner-disciplinary hearing that resulted in the loss of good-time credits is set aside, the state may have a new hearing and again take away the credits. In each of these instances, however, the action must be pursued in habeas, because the prisoner's constitutional challenge, if successful, would establish the illegality of his current or expected custody.

Moreover, it matters not whether that result is actually sought by the inmate, as in *Preiser*, or foresworn, as in *Balisok*. Nor does it matter whether release or shortening of custody would follow from a ruling that invalidates the underlying criminal conviction as in *Heck*, or from one that invalidates a state administrative ruling, as in *Preiser* and *Balisok*.

Rather, what is critical to any conclusion that claims must be brought initially in habeas is the fact that those claims – whatever their basis and whatever action their ultimate target – will, if successful, have a direct or necessary effect on the lawfulness of the fact or duration of the prisoner's confinement (absent further state action). Claims of a state inmate which, if successful, will have no necessary effect on his continuing custody or the legality of his confinement may proceed under § 1983. That is as it must be, since the habeas statute affords federal court jurisdiction over the claims of a state inmate "only on the ground that [the prisoner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

II. CLAIMS THAT SEEK A NEW PAROLE HEARING ARE COGNIZABLE UNDER § 1983 BECAUSE, IF SUCCESSFUL, THEY WOULD NOT DEMONSTRATE "THAT [THE PRISONER] IS IN CUSTODY IN VIOLATION OF THE CONSTITUTION OR LAWS . . . OF THE UNITED STATES"

Respondent originally sought "a new parole hearing" (Pet. Br. at 14) in which the proper parole guidelines and procedures would be followed. He made this request because, at the time suit was filed, the only parole hearing he had been afforded was the one in April 1999, which, he alleged, was substantially defective on both *ex-post-facto* and procedural-due-process grounds. Based on both of these claims, Respondent also sought prospective injunctive and declaratory relief.

Respondent Johnson's challenge to the April 1999 parole hearing, insofar as it requests a new parole hearing, has been eliminated by the State of Ohio's action in conducting a subsequent hearing in July 2001. That later hearing, which is not at issue in this case,[17] is the one that now impacts on Respondent's continued incarceration, and the earlier hearing that is challenged in this suit is of no continuing legal consequence to Respondent's current or future incarceration.[18] Further, as set forth in Section III, *infra*, neither Respondent Johnson's remaining claims for

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[17] Indeed, the subsequent July 2001 hearing occurred after both the filing of the complaint and its *sua sponte* dismissal by the district court.

[18] This matter is not moot, because Respondent *still* retains live claims for declaratory and prospective injunctive relief, as well as an intention to amend upon remand to seek nominal damages based on the events at the April 1999 hearing. Petitioners have not challenged Respondent's claims for declaratory and prospective injunctive relief and nominal damages, and the Sixth Circuit did not pass on the viability of those claims.

Moreover, Respondent's prospective injunctive relief claim is not moot because, as this Court has repeatedly made clear, "'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth v. Laidlaw Environmental Servs.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Rather, only where the defendant meets its "heavy burden" of making "it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur" will mootness be found. *Id.* at 189 (internal quotation marks omitted). Here, the Petitioners have not met that burden, because they have not shown that Ohio has ceased either its pattern of depriving prisoners of procedural protections in parole hearings or applying the 1998 Guidelines to state prisoners convicted of offenses committed before the Guidelines were promulgated.

Notably, standing is not at issue, most obviously because standing is measured at the commencement of the litigation, *see, e.g.*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 109 (1998), and Respondent plainly had standing when he filed suit in July 2000 to challenge the violations that allegedly occurred during his April 1999 hearing.

declaratory and prospective injunctive relief, nor a claim for nominal damages based on the events of April 1999 hearing, is required to be brought in habeas.

A. Even Before Respondent Was Afforded A New Hearing In July 2001, None Of Respondent's Claims Had To Be Brought In Habeas Because None Of Them Would Have Demonstrated The Invalidity Of The Fact Or Duration Of Respondent's Confinement

Leaving aside the fact of the new July 2001 parole hearing, and viewing Respondent's suit as of the time of filing – which included a request for a new parole hearing based on the violations in the April 1999 hearing – the suit was properly brought under § 1983, because success in the suit would not have led to a holding that demonstrated the invalidity of the fact or term of Respondent's incarceration. At most, success would have produced an order for a new parole hearing, as well as prospective relief correcting unconstitutional procedures and prohibiting *ex-post-facto* application of parole guidelines.

A critical element of the Court's ruling in *Preiser* requiring claims for the "restoration of those good-time credits" to be brought in habeas was the fact that such a ruling would have demonstrated the invalidity of the prisoners' confinement and, therefore, would have required the prisoners' "immediate release from physical custody." 411 U.S. at 487. However, because parole, in Ohio and elsewhere, is ultimately a matter of discretion, *see, e.g.*, *State ex rel. Duganitz v. Ohio Adult Parole Authority*, 672 N.E.2d 654, 656 (Ohio 1996), Respondent's original request for a new hearing would not have demonstrated the invalidity of his confinement and, thus, would have had no necessary effect on the duration of his confinement.

As Petitioners concede in their opening brief, "[t]he statutory standard for [parole] release is broad. It authorizes parole if the [parole board] determines it 'would further the

interests of justice and be consistent with the welfare and security of society.'" (Pet. Br. at 6.) Indeed, Petitioners go on to acknowledge that "it is well settled that the Parole Board *can* deny release for any constitutionally permissible reason or for no reason at all.'" (Pet. Br. at 6 (quoting *Inmates of Orient Correctional Inst. v. Ohio State Adult Parole Auth.*, 929 F.2d 233, 236 (6th Cir. 1991) (emphasis in Pet. Br.).)

In light of the extraordinary discretion that Petitioners admit the Parole Board has to deny parole, a claim seeking a new parole hearing is in no way, itself, a demand for immediate or speedier release, nor, if successful, would it "necessarily demonstrate[]" the unconstitutionality of his confinement. *Heck*, 512 U.S. at 481-82. To the contrary, all that such a suit can possibly produce is an opportunity to have one's parole denial reconsidered in a new hearing – by officials who are afforded broad discretion to grant or deny parole as they see fit. This, of course, is in contrast to a federal court order reversing a criminal conviction, or restoring good-time credits, or reversing a parole revocation – all of which must be pursued in habeas because each immediately makes plain that the state prisoner's custody or term of incarceration is in "violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a).

Amici for the Petitioners contend that all of this should be overlooked because, "on a human level," there "is no conceivable reason, other than for the purpose of obtaining earlier release from his confinement, that an inmate would go to the trouble of challenging the parole procedures applied to him." (Br. *Amici Curiae* of Alabama, *et al.* at 7.) But this argument ignores the bright-line rule set out in this Court's decisions, and the plain language of the habeas statute, which only provides jurisdiction where a state prisoner is alleging "that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Seeking to have one's parole status considered again in a discretionary proceeding, because a

prior hearing was procedurally defective, simply does not amount to a claim that the fact or duration of one's incarceration is in violation of federal law.

Heck v. Humphrey sets out two contrasting examples to illustrate that § 1983 jurisdiction is foreclosed only in those cases where a conclusive holding as to the illegality of the fact or duration of confinement follows *necessarily* from the claims asserted by the inmate. The first involved a state prisoner who had been "convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest," and who then brought a § 1983 action "against the arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures." As this Court explained, "[i]n order to prevail in this § 1983 action, [the prisoner] would have to negate an element of the offense of which he has been convicted," and since this would necessarily demonstrate the illegality of his continued confinement, a "§ 1983 action will not lie." 512 U.S. at 486 n.6 (emphasis in original).

Alternatively, the *Heck* Court offered the example of a state prisoner's § 1983 claim for damages for an allegedly unreasonable search that produced evidence introduced at trial. As to that claim, the Court concluded that, even if successful, such a claim did not necessarily lead to the conclusion that his conviction or sentence was unlawful, and, thus, that the claim could be pursued under § 1983. As this Court explained, such doctrines as inevitable discovery and harmless error meant that "such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful." *Id.* at 487 n.7 (emphasis in original).

Neither in *Preiser*, nor in any of the cases that have followed, has this Court foreclosed pursuit of a § 1983 action based on the ground that an inmate's present action may be the first step in a chain of events that could culminate in his

"early release." Indeed, if this were the standard, there simply would be no principled basis on which § 1983 actions could proceed on any number of state-prisoner claims that, if successful, could some day have a bearing (no matter how attenuated) on the amount of time that an inmate spends in custody. An inmate who challenges the imposition of such prison discipline as the suspension of certain privileges, for example, is pursuing a claim that may well have a bearing at some point on his term of incarceration. No one would seriously suggest that the mere possibility of a future consequence on the duration of confinement would render such a present challenge unfit for pursuit under § 1983. Indeed, such a conclusion would grossly undermine the effectiveness of the remedy available under § 1983.

B. Petitioners' Argument That Inmate Challenges To Denials Of Parole Must Be Pursued In Habeas Because They Would "Invalidate" State "Sentencing" Decisions Is Without Merit

While correctly stating the rule pronounced in *Heck* – a "prisoner cannot use § 1983 as a vehicle to mount a collateral attack that would 'necessarily imply the invalidity of' state court convictions or sentences," (quoting *Heck*, 512 U.S. at 487) – Petitioners leap to two critical unsupported assertions, ostensibly on the basis of *Balisok*. (Pet. Br. at 3.) The first is that "administrative decisions that affect the duration of a prisoner's confinement [including denials of parole]. . . count as 'sentences,'" for purposes of the *Heck*-bar. The second is that it is enough to trigger habeas jurisdiction if success on the suit "would 'necessarily imply' that a State must vacate a prior [parole] hearing and provide the prisoner a rehearing." (*Id.*)

1. Denials Of Parole Are Not Sentencing Decisions

Petitioners argue that parole decisions are "sentencing decisions," because in addition to deciding whether a prisoner will be released, parole hearings also establish "the next possibility of release by the scheduling of later release hearings." (Pet. Br. at 22.) As Petitioners see it, "this defined impact on duration (*i.e.*, scheduling the next release hearing five years out means the prisoner will serve that time)" makes these "scheduling decisions" nothing less than "sentencing decisions," because they establish the next fixed period of time during which the prisoner will remain in "custody." (*Id.*)

To be sure, an inmate's challenge to his court-imposed sentence is subject to exclusive habeas jurisdiction. *See, e.g.*, *Heck*, 512 U.S. at 487 (challenges to a "conviction or sentence" must be brought in habeas). However, Petitioners' characterization of "parole hearings" as some sort of second phase of sentencing is simply wrong. It is not only inconsistent with the historical and legal understanding of parole, but, if adopted, would carry extraordinary consequences for the parole and sentencing processes. *See, e.g.*, *United States v. Granderson*, 511 U.S. 39, 71 (1994) (Rehnquist, C.J., dissenting) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2068 (1971)) ("Sentence . . . is ordinarily meant in the context of criminal law to refer to the judgment or order by which a court or judge imposes punishment or penalty upon a person found guilty" (internal quotation marks omitted)).

As Petitioners correctly state, "Ohio employs an indeterminate sentencing system for most crimes committed before July 1, 1996. Under that system, the court sets the minimum and maximum term of the sentence." (Pet. Br. at 5.) The Ohio Parole Board, a unit of the executive branch, "then determines whether the inmate will be released before the maximum sentence and, if so, when release will occur."[19] (*Id.*)

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[19] *See generally Garafola v. Benson*, 505 F.2d 1212, 1217 (7th Cir. 1974) ("A major purpose of any indeterminate sentence provision is to

It is well established that, where an indeterminate sentencing system is employed, the actual sentence is "for the maximum period imposed by the court."[20] *Story v. Rives*, 97 F.2d 182, 187 (D.C. Cir. 1938). A parole board's decision to cut short a prisoner's incarceration before the maximum period has expired is, therefore, simply "relief from a penalty that has already been imposed – the full period of incarceration to which [a prisoner has been] sentenced."[21] *Ainsworth v. Stanley*, 317 F.3d 1, 5 (1st Cir. 2002), *cert. denied*, 538 U.S. 999 (2003); *see also State v. Henderson*, 2002 WL 31890341, at *4 (Ohio App. Dec. 31, 2002) (prisoner has no right to be conditionally released on parole "before the expiration of a valid sentence"); *Walls v. Haskins*, 263 N.E.2d 311, 312 (Ohio 1970) ("[P]arole is purely a matter of grace, not of right."). Put differently, a

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give the Parole Board discretion to determine when a prisoner has reached that point in his rehabilitation process at which he should be released under supervision to begin his readjustment to life in the community.").

[20] This was the understanding at common law, and remains the law today. *See, e.g.*, *United States v. Frias*, 338 F.3d 206, 210-11 (3d Cir. 2003); *United States v. Rodriguez-Arreola*, 313 F.3d 1064, 1066 (8th Cir. 2002); *United States v. Cordova-Beraud*, 90 F.3d 215, 219 (7th Cir. 1996); *United States v. Quinonez-Terrazas*, 86 F.3d 382, 383 (5th Cir. 1996) (citing BLACK'S LAW DICTIONARY 694 (5th ed. 1979)); *United States v. Reyes-Castro*, 13 F.3d 377, 380 (10th Cir. 1993); *Sturm v. California Adult Auth.*, 395 F.2d 446, 448 (9th Cir. 1968); *Paladino v. Comm'r of Immigration*, 43 F.2d 821, 822 (2d Cir. 1930).

[21] *See also Fowler v. United States Parole Comm'n*, 94 F.3d 835, 839 (10th Cir. 1996) ("traditional parole is merely 'a conditional release from incarceration . . . prior to the expiration of the full term set by the sentencing court'" (citing *Parry v. Rosemeyer*, 64 F.3d 110, 116 n.10 (3d Cir. 1995))); 59 AM. JUR. 2D, *Pardon and Parole* § 123 (2002) ("A denial of parole is not an increase in the sentence. Parole is a supervised release from incarceration prior to the termination of sentence and, conversely, the denial of parole has the effect of perpetuating the status quo, that is, continued incarceration during the term of sentence.").

decision to grant parole is *not* the "exercise[] of a 'sentencing' power,"[22] but, instead, is the "authority to commute or terminate an indefinite sentence that, but for the Board's discretion, would run until the maximum period is reached."[23] *Padilla v. Utah Bd. of Pardons & Parole*, 947 P.2d 664, 669 (Utah 1997). *See also In re Lynch*, 503 P.2d 921, 925 (Cal. 1973) (same).

Moreover, there would be substantial constitutional significance to treating a parole hearing as part of the sentencing process. For example, because of "the critical nature of sentencing," the Sixth and Fourteenth Amendments entitle a criminal defendant at sentencing to the right to be represented by counsel and the related right to effective assistance of counsel. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). *See also Golden v. Newsome*, 755 F.2d 1478, 1481-82 (11th Cir. 1985).

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[22] *See State ex rel. Bray v. Russell*, 729 N.E.2d 359, 362 (Ohio 2000) ("sentencing of a defendant convicted of a crime [is] solely the province of the judiciary"); *Budd v. Kinkela*, 2002 WL 1937134, at *3 (Ohio App. Aug. 20, 2002) ("determining parole is not a judicial function, but is purely executive in nature," and "[t]hus, the action of the [Parole Board] in denying appellant parole does not invade the sentencing province of the judiciary").

[23] *See generally French v. Cox*, 396 P.2d 423, 426 (N.M. 1964) ("[U]nder the indeterminate sentence law, the prisoner can only claim his debt to the state as being satisfied, as of right, upon expiration of the maximum period fixed by his sentence, less such good conduct time as may be provided by statute. The minimum sentence, less good time, merely fixes a date when, as a matter of grace and not of right, the prisoner may be permitted to serve the balance of his sentence outside the penitentiary, under such circumstances and conditions as the parole authorities may provide."); *People v. Montgomery*, 669 P.2d 1387, 1392 (Colo. 1983) ("[P]arole is a matter of grace and the granting or denial of parole is an executive, not a judicial, function."); ARTHUR W. CAMPBELL, LAW OF SENTENCING § 17:6 (2d ed. 1991) ("the decision to grant parole is a matter of executive grace").

Were Petitioners correct in their novel assertion that "[u]nder Ohio law, sentencing authority is divided between the courts and the [parole board]," and that "parole officials exercise sentencing discretion and make sentencing decisions" (Pet. Br. at 20), the Sixth Amendment right to counsel would extend through the "parole phase" of sentencing, which is not presently the law. *See, e.g.*, *McGee v. Aaron*, 523 F.2d 825, 827 n.2 (7th Cir. 1975) (no right to counsel during parole proceedings). Indeed, this very argument was considered and rejected in *Ganz v. Bensigner*, 480 F.2d 88 (7th Cir. 1973) (Stevens, J.):

> Plaintiff argues that if the sentence is of indeterminate length, the sentence process includes the proceedings before the Parole Board. Logically, that argument would support a conclusion that "the entire range of correctional process after sentencing is a part of the criminal proceeding" – a conclusion we have already rejected. . . . "Parole arises after the end of the criminal prosecution, *including imposition of sentence*."

Id. at 89 (citations omitted, emphasis added).

Furthermore, the flexibility and utility of parole proceedings would be significantly curtailed because of other constitutional requirements that would attach – including the Sixth Amendment's jury trial right and the Fifth Amendment's guarantee against double jeopardy. For example, in Ohio (as in most other states that still use indeterminate sentencing and parole), the Parole Board assigns "an offense category score" to determine a guideline range for parole release; however, the board may exceed such guidelines when it determines that the crime involved "aggravating factors," "including crimes that did not result in conviction." *Viceroy v. Ohio Dep't of Rehabilitation and Corrections*, 2003 WL 22389868, at *2-3 (Ohio App. Oct. 17, 2003). If parole proceedings are in fact recognized as part of the sentencing phase, then under this Court's precedent parole boards might well be precluded from

exceeding the parole range guidelines based on facts that were not put to the jury. *See, e.g.*, *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

Likewise, the doctrine of collateral estoppel embodied in the Fifth Amendment's guarantee against double jeopardy would also come into play to prohibit a state parole board from, for example, considering earlier criminal activity that was part of an indictment dismissed with prejudice.[24] Currently, parole authorities can look to this information in deciding whether a prisoner is fit for parole. *See also Mayrides v. Ohio State Adult Parole Auth.*, 1998 WL 211923, at *4 (Ohio App. April 30, 1998); *cf. Standlee v. Rhay*, 557 F.2d 1303, 1307 (9th Cir. 1977) (the doctrine of collateral estoppel, as embodied in the Fifth Amendment guarantee against double jeopardy, did not prohibit a state parole board from finding the petitioner guilty of parole violations following acquittal on the same charges in a criminal trial).

All of these potential constitutional restrictions would, of course, substantially interfere with parole boards by limiting not only the material that they may consider, but also the processes that they may employ. Ultimately, this would

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[24] In *State ex rel. Lipschutz v. Shoemaker*, 551 N.E.2d 160 (Ohio 1990), the Ohio Supreme Court held that the Parole Board could deny parole based on criminal conduct that did not result in a criminal conviction. In *Shoemaker*, the defendant had been indicted on two counts of aggravated murder, had pled guilty to the first count, and had succeeded in having the second count dismissed. *Id.* at 161. Nonetheless, the Parole Board later denied parole on the ground that the defendant had committed two murders. *Id.* The Ohio Supreme Court upheld this result because it found that the Board had a rational basis for concluding that the defendant had committed two murders and that considering such wrongdoing was authorized by the state parole guidelines. *Id.* at 162. *See also, e.g.*, *Banks v. State*, 920 P.2d 905, 908 (Idaho 1996) (parole board could deny parole because of offenses for which prisoner had been acquitted when prisoner's own statement indicated rational basis for allegations).

undermine the central mission of parole boards – *i.e.*, to determine an individual's fitness to be at liberty in society. *See generally Greenholtz*, 442 U.S. at 13 (parole "is a component of the long-range objective of rehabilitation," and parole decisions are "necessarily subjective in part and predictive in part" to that end).

In sum, Petitioners' novel contention that parole decisions are "sentencing decisions" lacks any support in law or policy.[25] Parole decisions do not set a period of confinement and, thus, are not the cause of a prisoner's being "in custody in violation of the Constitution" or federal laws so as to trigger habeas jurisdiction or implicate *Heck*'s bar to a § 1983 suit.

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[25] Petitioners cite *Mistretta v. United States*, 488 U.S. 361 (1989), for the proposition that parole decisions are in fact "sentencing decisions." (Pet Br. at 21.) The holding in *Mistretta*, of course, had nothing to do with federal parole, but addressed whether the creation of the United States Sentencing Commission to devise guidelines to be used for sentencing violated the constitutional separation of powers. *Id.* at 362-63. Any discussion of parole was simply background *dicta* since, in creating the Commission, Congress "prospectively abolish[ed]" parole. *Id.* at 367.

But the *Mistretta* Court was clear that parole is a discretionary "release decision[]," and that it is the judge that makes the actual "sentencing" decision. *Id.* at 363 ("[Indeterminate sentencing and parole] obviously required the judge and the parole officer to make their *respective sentencing and release decisions* upon their own assessments of the offender's amenability to rehabilitation." (emphasis added)). Indeed, the Court went on to add that federal parole was "the discretion to release a prisoner before the expiration of the sentence imposed by the judge." *Id.* at 364-65.

2. Under *Heck* And *Balisok*, A § 1983 Suit That Would Nullify A State Administrative Proceeding Is Only Barred If The Suit Would Also Establish The Invalidity Of The Prisoner's Term Of Confinement

Separate and apart from whether a parole denial is a sentencing decision, Petitioners urge the Court to extend *Heck* to bar challenges to all state administrative (as well as judicial) decisions that are related in any way to an inmate's term of incarceration. Indeed, Petitioners identify as the primary error of the court below its construction of the *Heck* bar as limited to § 1983 claims that necessarily imply the invalidity of the fact or term of an inmate's incarceration. (Pet. Br. at 3, 17.) Because a § 1983 action such as Respondent's that challenges the parole guidelines or procedures can only produce a new hearing (or nominal damages and other prospective injunctive relief), and cannot result in an order ending or shortening the term of incarceration, the court below found the *Heck*-bar to be inapplicable. Petitioners (and the dissent in the court below) argue, by contrast, that "the Court's statements in *Heck* and *Balisok*, as well as the facts and results in those cases, make it plain that invalidation is measured by the implications of the federal claim *for the state decision*, not the implications for the prisoner's confinement."[26] (*Id.* at 17 (emphasis in Pet. Br.).)

The brunt of Petitioners' argument is thus that *Heck* and *Balisok* have somehow extended habeas jurisdiction far beyond the actual text of § 2254(a) – beyond a claim "that [a

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[26] Judge Gilman's dissent likewise asserted "that the majority opinion's test is contrary to the holdings of *Heck* and *Edwards*." (Pet. App. at 23a; 329 F.3d at 474.) After summarizing the rulings of those cases, the dissent concluded: "In other words, it is the implied invalidity of the administrative hearing itself – that can be corrected only by a new hearing – that is an impermissible result of a § 1983 claim."

prisoner] is in custody in violation of" federal law.[27] In their view, the inmate's legal claim need not, if successful, "necessarily imply" anything about the legality of the inmate's term of incarceration. For Petitioners, as for the dissent below, habeas has somehow become the exclusive avenue of relief for all inmate challenges to state decisions that could, in some conceivable attenuated manner, impact when or whether the inmate will be released. (Pet. Br. at 23-24.) But this conclusion cannot be supported. In *Heck*, this Court held that:

> when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of *his conviction or sentence*; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

512 U.S. at 487 (emphasis supplied).

Thus, *Heck* does not bar § 1983 challenges that do not require a federal court to resolve the validity of a prisoner's confinement. Nor, contrary to Petitioners' contention, does *Edwards v. Balisok*, 520 U.S. 641 (1997), in any way hold "that a federal decision necessarily implying the need for a new [parole] hearing falls within *Heck*'s bar." (Pet. Br. at 28.) Petitioners argue, in particular, that "*Balisok* applied the *Heck* bar to claims that would entitle a prisoner only to a rehearing, not to a definite reversal of the first hearing's result" (*id.* at 26), so that the same conclusion necessarily follows where an inmate challenges a denial of parole,

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[27] There exists an open question whether apart from claims that directly or necessarily demonstrate the invalidity of a state prisoner's fact or duration of confinement and thus must be brought in habeas, there is some category of claims that may be brought under both habeas and § 1983. For purposes of this case, however, the critical consideration is that Respondent's claims are not of the type that must be brought in habeas alone.

which, if successful, would likewise result in a new hearing (but not necessarily a different result). But this contention fundamentally ignores the nature of the relief at issue in *Balisok* and in this case.

In *Balisok*, the state prisoner challenged the loss of good-time credits resulting from an administrative disciplinary proceeding, arguing in part that the decisionmaker was biased and engaged in deception. As this Court recognized, if successful, the suit would result in the vacating of the administrative decision, which in turn would invalidate the withdrawal of good-time credits – *i.e.*, would invalidate the prisoner's longer term of incarceration that had resulted from the administrative decision. Thus, the Court "conclude[d] . . . that respondent's claim . . . based on allegations of deceit and bias on the part of the decisionmaker that *necessarily imply the invalidity of the punishment imposed*, is not cognizable under § 1983." 520 U.S. at 648 (emphasis added).

Where, as here, an inmate's challenge is to the procedures employed in a hearing at which parole is denied, the suit, if successful, would have no such direct impact. Unlike *Balisok*'s challenge to the revocation of good-time credits, this suit cannot result in an order whose consequence, either directly or by "necessary implication," is to hold invalid either the fact or the expected term of incarceration. It can only result in a new hearing, at which state officials would once again render a discretionary decision concerning the inmate's parole, this time employing the required procedures. There is, thus, a clear distinction between the challenge to a revocation of good-time credits at issue in *Balisok*, and a procedural challenge to denial of parole, at issue in this case. The first, if successful, would necessarily imply a shorter sentence; the second would not.

Petitioners seek to make much of the fact that in *Balisok*, as in the present case, a rehearing of the same administrative allegations was a likely consequence of any ruling in favor

of the inmate. (Pet. Br. at 26-28.) In particular, they note the *Balisok* Court's observation "that Balisok might well obtain the same results at a new hearing. 520 U.S. at 647-48." (Pet. Br. at 27.) Hence, they assert that *Balisok* is essentially like this case, since in both the ultimate time served might depend on rehearings that have yet to occur.

But the fact that success in the lawsuit may lead to a future administrative hearing decision favorable to the inmate is, standing alone, irrelevant to the determination of whether an inmate's claim may properly proceed under § 1983. Rather, this Court's decisions have focused upon the direct impact – and the "necessary implications" – that a successful lawsuit would have on the legality of the fact or expected term of the inmate's confinement. Indeed, whatever the subject of an inmate's lawsuit, it will often or even usually be true that the outcome of the suit will not be the last word in determining the inmate's term of incarceration. The fact that an action like the present one, which may through the mechanism of a new hearing later lead to a reduced term of incarceration, does not mean that such a result is a necessary implication from the suit itself, or that such an action under § 1983 is therefore improper. *See, e.g.*, *Muhammad*, 124 S. Ct. at 1306 ("administrative determinations do not as such raise any implication about the validity of the underlying conviction, and although they may affect the duration of time to be served (by bearing on the award or revocation of good-time credits) that is not necessarily so").

In sum, the critical distinction between Balisok's claim on the one hand, and Respondent's claim on the other, is that, for Balisok, success in his lawsuit led directly – unless later modified – to a shorter stay in prison; for Respondent, a

successful suit carries no such necessary implication for the legality of the fact or expected term of his confinement.[28]

C. Petitioners' Arguments Based On Comity Do Not Justify The Requested Departure From The Law As It Has Been Articulated By This Court

Petitioners assert that "concerns of comity and federalism often require that § 1983 not receive the full breadth that its language suggests" (Pet. Br. at 43), and that "limiting" § 1983's "literal text" here would afford state courts a "fair possibility" to resolve the claims (*see* Pet. Br. at 45-48), and would limit disruptive federal interference in state prison management (*see* Pet. Br. at 41-42).

These vague (and one-sided) notions of comity and federalism, however, have no relevance to the statutory-interpretation question presented here: whether Respondent's

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[28] This Court's decisions last term confirm that the relevant inquiry, for *Heck* purposes, is the impact of success on the legality of the prisoner's length of custody:

> Although damages are not an available habeas remedy, we have previously concluded that a § 1983 suit for damages that would "necessarily imply" the invalidity of the fact of an inmate's conviction, or "necessarily imply" the invalidity of the length of an inmate's sentence, is not cognizable under § 1983 unless and until the inmate obtains favorable termination of a state, or federal habeas, challenge to his conviction or sentence. This "favorable termination" requirement is necessary to prevent inmates from doing *indirectly* through damages actions what they could not do directly by seeking injunctive relief – challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute.

Nelson v. Campbell, 124 S. Ct. 2117, 2124 (2004) (internal citations omitted). *See also Muhammad*, 124 S. Ct. at 1304 n.1, 1306 (criticizing the "mistaken view expressed in Circuit precedent that *Heck* applies categorically to all suits challenging prison disciplinary proceedings" and confirming that "the incarceration that matters under *Heck* is the incarceration ordered by the original judgment of conviction").

claims must proceed under the narrow confines of habeas jurisdiction as provided by § 2254(a), or whether they may be pursued under § 1983. Petitioners fail to recognize that, absent such a statutory conflict, this Court has "no authority to narrow the 'broad language' of § 1983, which speaks of deprivations of 'any' constitutional rights, privileges, or immunities, by '[e]very' person acting under color of state law, and to which '[this Court] ha[s] given full effect [by] recognizing that § 1983 'provide[s] a remedy, to be broadly construed, against all forms of official violation of federally protected rights.'" *Heck*, 512 U.S. at 502 (Souter, J., concurring). And as demonstrated above (*see supra* Sections II(A) & II(B)), neither under the terms of the habeas provision nor this Court's decisions would challenges under § 1983 to parole guidelines and procedures be barred. Comity and federalism do not warrant extending *Heck* further, as Petitioners suggest.

Equally unavailing is Petitioners' contention that this Court should not allow § 1983 to "receive the full breadth that its language suggests" because of "[t]he state interest in prison management." (Pet. Br. at 43, 44.) *First*, Petitioners never explain how a successful § 1983 suit to obtain a new parole hearing would improperly interfere with a state prison system. Indeed, there is no reason to suppose that it would, because (as the majority opinion below recognized) the most that success on such a claim would yield a prisoner is "a new hearing that would follow the appropriate procedures under Ohio law" (Pet. App. 17a); the discretionary authority of the Parole Board to grant or deny parole would remain unhampered.

Second, if requiring a new hearing were indeed enough to improperly impede a state's management of its prison system, then there would be no principled basis for distinguishing among any number of other § 1983 claims. For example, there is no reason to believe that challenges to the procedures employed in a parole proceeding would be any more disruptive of the states' "important" "interest in

prison management" than a suit challenging disciplinary segregation for misconduct, *see, e.g.*, *Sandin v. Conner*, 515 U.S. 472 (1995), objecting to a prison rehabilitation program, *see, e.g.*, *McKune v. Lile*, 536 U.S. 24 (2002), seeking access to "adequate [prison] law libraries or adequate assistance from persons trained in the law," *see, e.g.*, *Bounds v. Smith*, 430 U.S. 817 (1977), protesting limitations on certain religious practices, *see, e.g.*, *Cruz v. Beto*, 405 U.S. 319 (1972) (*per curiam*), or requesting adequate medical care, *see, e.g.*, *Estelle v. Gamble*, 429 U.S. 97 (1976). Yet, each of these challenges is cognizable under § 1983.

Finally, Congress has already ameliorated any risk of improper interference with state prison management through Section 802 of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, 1321-66. For example, the Act requires that inmates exhaust available state administrative remedies before bringing a § 1983 challenge such as Respondent's here, 42 U.S.C. § 1997e(a), and it mandates that a district court "shall," on its own motion, dismiss "any action brought with respect to prison conditions under section 1983 . . . if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from relief," 42 U.S.C. § 1997e(c)(1).

* * *

At bottom, *Preiser* and *Heck* aim to square § 1983's expansive language with the narrowly-tailored relief afforded under the federal habeas statute in order to prevent state prisoners from circumventing the habeas exhaustion requirements. Here, no matter how successful, Respondent's claim would not jeopardize his underlying conviction or sentence, would not itself result in an immediate or speedier release, and would have no necessary consequence for the legality of his expected term of confinement. Thus, there is

no basis to judicially foreclose an otherwise viable § 1983 action that neither clashes with the federal habeas statute nor requires limitation "for the sake of honoring some other statute or weighty policy." *Spencer v. Kemna*, 523 U.S. 1, 20 (1997) (Souter, J., concurring).

III. IN ANY EVENT, BECAUSE OHIO HAS AFFORDED RESPONDENT A SECOND PAROLE HEARING, HIS ONLY REMAINING CONTENTIONS ARE CLAIMS FOR PROSPECTIVE RELIEF AND NOMINAL DAMAGES THAT ARE PLAINLY COGNIZABLE UNDER § 1983

As discussed above (*supra* at 1, 10, 24), Ohio granted Respondent a new parole hearing in July 2001 while this case was pending in the court of appeals. Of course, the nature and adequacy of the 2001 hearing played no part in the proceedings in the district court, whose decision was rendered before that hearing. Respondent advised the court below of the occurrence and outcome of the July 2001 parole hearing in his *en banc* briefing, but raised no challenge to that hearing at that time.[29] At no point did the decision of the court below, or the dissent, reference the July 2001 hearing. The case now before this Court does not embody any challenge to the latter hearing.

As a result, there is at issue no parole hearing with any continuing consequence whatsoever for Respondent's confinement. The April 1999 hearing (which is the subject of this suit) no longer has any bearing on Respondent's parole status, and the operative July 2001 hearing is not challenged in this suit. Accordingly, this case comes before the Court essentially as a request for declaratory and

[29] *See* Supplemental Brief of Plaintiff/Appellant Rogerico Johnson to the Sixth Circuit, at 2 n.2 (dated Oct. 25, 2002).

prospective injunctive relief – both on Respondent's behalf[30] and for a class of similarly-situated state prisoners[31] – encompassing no live challenge to a parole hearing at all.[32] Thus, these claims would not fall within the reach of the habeas provision (*i.e.*, habeas would be unavailable) even if one were to accept Petitioners' invitation to expand habeas jurisdiction to include state prisoner suits that would "invalidate" a parole hearing. (Pet. Br. at 23-25.)

Assuming, contrary to our argument in Section II, *supra*, that an inmate's action seeking a new parole hearing is *Heck-*

[30] Respondent Johnson has standing to assert this claim because he will be subject to further parole hearings and because, as he alleges in his complaint through supporting affidavits from fellow inmates, Ohio has routinely and broadly employed these flawed procedures and may well apply them to Johnson again in the future. Respondent, therefore, is entitled to seek individual prospective injunctive relief to ensure that his future hearings are conducted in a manner consistent with due process.

In any event, because – as was true of the claim for prospective injunctive relief in *Balisok*, 520 U.S. at 648-49 – neither the court of appeals nor the district court considered the injunctive claim, any questions about standing here should similarly be reserved for the "lower courts on remand." *Id.* at 649.

[31] Respondent Johnson also attached numerous affidavits from other Ohio prisoners that assert the flawed procedures employed in his prior parole proceeding are employed by Ohio as a pattern and practice. (J.A. 55-73.) Johnson is permitted to pursue these class claims for prospective injunctive relief as part of his § 1983 suit here. *See, e.g., Wolff v. McDonnell*, 418 U.S. at 554-55 (holding that § 1983 is a permissible vehicle for a class representative of state prisoners who seeks an "injunction enjoining the prospective enforcement of invalid prison regulations" that authorized the "taking of good time credits in violation of the due process clause").

[32] In addition, Respondent is entitled to seek (and has stated both to this Court and the court of appeals below that he intends to request) nominal damages relief based on the alleged due process/equal protection violations that occurred in the April 1999 parole hearing. *See, e.g., Carey v. Piphus*, 435 U.S. 247 (1978).

barred, there is language in *Heck* arguably suggesting that the bar remains applicable even where, as here, a habeas challenge is not available. *Heck*, 512 U.S. at 489 ("Even a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated or impugned by the grant of a writ of habeas corpus."); *see also Spencer*, 523 U.S. at 17 (stating in *dicta* that a § 1983 action for damages is not "always and everywhere" available). Such reasoning should be rejected as unduly limiting the scope of § 1983 for no good reason.

The entire purpose of the *Heck* bar is to prevent prisoners from using § 1983 to circumvent the habeas exhaustion requirement. *See Heck*, 512 U.S. at 486-87. Where (as here) circumvention is no longer at issue because a habeas action would be unavailable, there is no basis in law or policy for barring a prisoner's § 1983 claim. *See id.* at 503 (Souter, J., concurring) ("I would not cast doubt on the ability of an individual unaffected by the habeas statute to take advantage of the broad reach of § 1983.").

Indeed, where habeas is no longer available, the only result of precluding a § 1983 suit would be to strip state prisoners of any means whatsoever to vindicate their constitutional rights in federal court – either through prospective injunctive relief or nominal damages.[33] This was clearly not Congress' aim when it enacted the habeas statute. *See Heck*, 512 U.S. at 501 (Souter, J., concurring) ("It is one thing to adopt a rule that forces prison inmates to follow the

[33] This, of course, assumes that the unavailability of habeas is through no fault of the inmate. If, for instance, habeas is "unavailable" because the applicable one-year statute of limitations has expired, 28 U.S.C. § 2244(d), no § 1983 action should lie because permitting such a claim would allow inmates to circumvent the habeas exhaustion requirements and purposely take steps to eliminate their habeas remedies.

federal habeas route with claims that fall within the plain language of § 1983 when that is necessary to prevent a requirement of the habeas statute from being undermined. . . . It would be an entirely different matter, however, to shut off federal courts altogether to claims that fall within the plain language of § 1983."); *see also*, *Spencer*, 523 U.S. at 19-21 (Souter, J., concurring); *id.* at 21-22 (Ginsburg, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting). *See generally* RICHARD H. FALLON, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM 1451 (5th ed. 2003). Indeed, Congress only sought to create an exception to § 1983 where a habeas action more properly lies; but where no such habeas action would be available, § 1983 returns to fill the void. *Heck*, 512 U.S. at 499, n.4 (Souter, J., concurring); *see also Spencer*, 523 U.S. at 20 (Souter, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting).

In sum, neither Respondent's claims for declaratory and prospective injunctive relief, nor for nominal damages, would have any necessary consequence on the legality of his continued custody, or even upon any operative parole decision at issue in this case. Accordingly, on the facts before the Court, Respondent is entitled to proceed under § 1983 even if Petitioners were correct that habeas is the exclusive vehicle for attacks on parole hearing decisions that, if successful, would warrant a new hearing.[34]

[34] It is particularly imperative that Respondent be allowed to assert a § 1983 nominal damage claim based on the procedural irregularities in the April 1999 hearing. *Cf. Carey*, 435 U.S. at 266-67 (allowing nominal damages for due process violations). That could prove his only means to vindicate the alleged constitutional violations in the event that he is unable to establish the more demanding criteria for prospective injunctive relief.

CONCLUSION

The court of appeals' decision reinstating Respondent's case should be affirmed.

Respectfully submitted,

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October 15, 2004

OHIO PAROLE BOARD DECISION

Name:	**Inmate No.:**	**Date:**
ROGER JOHNSON	A198212	7/27/01

Hearing Type:	**Security Level:**	**Sentence:**	**Max/Eds/Est** (circle one)
REHEAR	HIGH MAX	10-30 yrs	2-17-2021

1. The (offense) (parole violation) behavior has been rated as Category 8 because the offense behavior involved (Circle appropriate behavior):

Rescind/Rehear CII R19 Resched O/A 12/31/86, while occupying a taxi as a fare, inmate grabbed taxi driver around the throat put gun to his head. Inmate hit driver on side and front of head with pistol. Weapon was discharged during commission of felony.
Section No.(s): 321(b)

2. The Criminal History/Risk Score is 1.

3. The Guideline Range is 60-84 months.

4. Time served 172 mos + JTC 6 (178 days) mos = Total Time Served 178 mos. TPV Arrest Date: _____

5. Check if non-applicable ____. The inmate has committed new felony criminal conduct in a prison facility that is rated as
   Category __ because it involved: See Supplemental Sheet
   Revision of C II R 19's Section No.(s): _____

   The Rescission Criminal History/Risk Score is _____
   This conduct requires __ months be added to the guideline range.

6. Check if non-applicable _____

A. The inmate has committed __2__ disciplinary infractions involving non-felonious threatening conduct against staff and/or non-felonious possession of a dangerous instrument (6-12 months per infraction to be added to the guideline range) that occurred on the following dates:

(12-24)
4/15/92 C II R 8 sharp piece contraband
6/95 C II R 8 weapon used to slash another inmate

B. The inmate has committed _____ disciplinary infractions involving possession or use of alcohol and/or possession or use of a controlled substance other than possession of a controlled substance with intent to distribute (3-6 months per infraction to be added to the guideline range) that occurred on the following dates:

_____

C. The inmate has committed _____ disciplinary infractions involving other misdemeanor conduct (0-6 months per infraction to be added to the guideline range) that occurred on the following dates:

_____

D. The inmate has committed __13__ other significant disciplinary infractions (0-2 months per infraction to be added to the guideline range) that occurred on the following dates:
See supplemental sheet (0 - 26)

This conduct requires 12 - 50 months to be added to the guideline range.

* * [End of page one of original form] * *

Name:	Inmate No.:	Date:
ROGER JOHNSON	A198212	7/27/01

7. Check if non applicable _____. The aggregate guideline range is 1:3,2 168-278 months.

Revision

60-84
6-12
70-132
54
12-24
0-26

8. After review of all relevant factors and information presented.

X A. A decision outside the guidelines at this consideration is not warranted. Therefore, the Board's decision is within the applicable guideline range.

___ B. Rescission guidelines were used to address rescission behavior since the last time setting hearing, and the aggregate guideline range is exceeded.

___ C. A decision (Above/Higher) (Below/Lower) the guidelines is warranted because:

___ (1) The Inmate's offense behavior involved the following specific (aggravating) (mitigating) factors:

___ (2) The Inmate is a (poorer) (more serious) (better) risk than indicated by his/her criminal history score for the following specific reasons:

___ (3) Other specific reasons:

List number of guideline ranges departed:
Vertical _____ Horizontal _____
List selected guideline range: _____ months

Panel recommends middle of aggregate range inmate has numerous serious violations and is currently high max inmate.

9. Total time to be served 223 to con't months.
45 mo to con't.

10. Optional Outstanding Program Achievement
___ granted X not granted
(Note: The granting or denying of such credit is discretionary.)

The Board's decision includes a _____ month credit to outstanding program achievement as specified below:

11. Adjusted total time to be served _____ months.

12. Recommendation: con't 4/2005 & CO to notify

13. Institutional conditions prior to PRD on next hearing: _

14. Hearing Panel:
Board Member: s/REL Hearing Officer: s/RAH SRW

Release on PRD is contingent on good institution behavior and/or reduction from maximum security status.

A PRD may be extended for a Class II violation when the case is reviewed at the PRD Pre-Release Review.

* * [End of page two of original form] * *

Name:	Inmate No.:	Date:
ROGER JOHNSON	A198212	7/27/01

SUPPLEMENTAL OHIO PAROLE BOARD DECISION

(List the number of the applicable Ohio Parole Board Decision Section and the additional information.)

¶5 C II R 19 Assault [Illegible] 1(W)(2)
Inmate threw hot liquid in unit manager's face
O/A 7/6/97
7/97 C II R 19 Assault CO (6) 18
A/S 11/96 C II R 19 weapon under disability CO 13 (R1B) (6)18
9/91 C II R 19 Assault (inmate) (6) 6
3/92 C II R 19 Assault (6) 18
4/92 C II R 19 Arson (6) 18
6/95 C II R 19 Agg Assault (6) 18
9/95 C II R 19 Assault (6) 18
12/95 C II R 19 Assault (6) 18
40-132
¶ 6D 54 -
4/18/92 C II R 9, 19 1/94 C II R 1
5/27/92 C II 4, 15 10/94 C II R 14
10/93 C II R 1 11/94 C II 1, 4
2/94 C II R 12 6/95 C II R 8
10/93 C II R 4 7/95 C II R 3
12/92 C II R 4 6/95 C II R 3
2/96 C II R 4, 12

Supreme Court, U.S.
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(14)

No. 03-287

In The Supreme Court Of The United States

REGINALD WILKINSON, Director, et al.,
Petitioners,

v.

WILLIAM DWIGHT DOTSON, et al.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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ARGUMENT

One key mistake permeates Respondents' briefs. They insist that *Heck v. Humphrey*, 512 U.S. 477 (1994), is designed to prevent collateral attacks on state confinement. It is not. Rather, as we showed in our opening brief, *Heck* is concerned with a claim's impact on state decisions, not on the confinement that results from those decisions. Once that distinction is clear, Respondents' remaining arguments fall away. Parole decisions are sentencing decisions for *Heck* purposes in that they directly impact the duration of incarceration. And the new parole decisions in 2002 do not help Respondents, but rather hurt them. For these are simply two more state decisions for which success on Respondents' claims would "necessarily imply invalidity."

Nor do Respondents fare any better in their opposition to Petitioners' relief-based argument. We showed that the relief Respondents request here—immediate new release hearings, and an increase in the frequency of future release hearings—independently triggers *Heck's* bar. And in making this argument, Petitioners are not, as Respondents assert, improperly raising *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Rather, *Heck* incorporates *Preiser's* command that claims seeking immediate or speedier release, the result Respondents ultimately seek here, must be routed to habeas.

In the end, Respondents attack state sentencing decisions, and they do so not in hopes of improving the conditions of their confinement, but rather in hopes of hastening its end. Under *Heck*, such claims must be brought, if it all, in habeas.

A. *Heck* prevents collateral attack on state decisions, and thus it bars Respondents' claims as they seek to attack such decisions.

Respondents do not meaningfully dispute that their ex post facto claims would remove the legal bases for their parole decisions. Instead they ask the Court to overlook the impact success on those claims would have on the state decision, and instead focus on the impact on the prisoner's confinement. The Court should decline their request for three reasons.

1. Respondents' argument is based on the unsupported premise that the *Heck* bar is concerned with preventing attacks on confinement rather than preventing attacks on decisions. So, for example, Johnson asserts that the applicability of the *Heck* bar turns on whether the claims "will, if successful, have a direct or necessary effect on the lawfulness of the fact or duration of the prisoner's confinement." Johnson Br. at 23. Dotson similarly argues that *Heck* applies only if success would show that a prisoner's "sentence or continuing incarceration was illegal." Dotson Br. at 12. That is, both look to the potential consequences of invalidating the state decision, rather than to the impact of the federal court judgment on the state decision itself, in defining *Heck's* scope. But that understanding of *Heck* is flawed.

First, Respondents' approach is inconsistent with the fundamental principle animating *Heck*—"the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." 512 U.S. at 486. The *Heck* Court amplified this principle by citing to the "strong judicial policy against the creation of two conflicting resolutions arising out of the same . . . transaction," by its expressed "concerns for finality and consistency," and by its disinclination "to expand

opportunities for collateral attack." *Id.* at 484-485. These concerns, however, are all directed toward protecting the state *decision* from collateral attack in federal court, not the confinement that results from that conviction. A decision needs "finality"; a confinement does not.

The claims here are a direct attack on a protected decision. As described below, parole decisions count for *Heck's* purposes. And the claims here, if successful, would invalidate those decisions. It is that invalidation itself, not the consequences of the invalidation (i.e., the impact of the invalidation on the prisoner's confinement), that triggers *Heck's* bar. The "concern for finality," *id.* at 484-486, is fully implicated by the initial nullification of the state decision, regardless of what may follow. Yet Respondents' approach looks *only* to what follows, and thus overlooks the core harm *Heck* sought to address.

Second, the snippets Respondents quote from *Heck* and its progeny do not, when read in context, support their premise that *Heck* is limited to claims that will inevitably effect confinement. Although *Heck's* discussion of the general bases for its holding did mention claims that "necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement," *id.* at 486, its specific holding did not make an inevitable effect on confinement a precondition to the applicability of its favorable termination requirement. Indeed, another part of the opinion stated that the requirement applied to claims by released prisoners, claims that could not possibly effect confinement. *Id.* at 490 n.10. And even if *Heck* were so limited, it is of no help to Respondents, as their claims *do* challenge the lawfulness of the definite periods of confinement their parole decisions imposed.

Moreover, while *Edwards v. Balisok* characterized the claim at issue there as one that that implied "the invalidity of

the punishment imposed," 520 U.S. 641, 648 (1997), that statement cannot be read to require a definite impact on confinement. Given *Balisok's* primary emphasis on the decision-making process itself, its express recognition that the same result would likely occur on rehearing, and the absence of any analysis even remotely relating to confinement, the quoted language is better understood as a shorthand reference to the challenged decision than a requirement that the claim inevitably affect confinement. And, as was true of the fragment from *Heck* just discussed, that statement does not help Respondents in any event. They *do* challenge the terms of imprisonment imposed by their parole decisions—"the punishment imposed"—claiming that the challenged regulations unconstitutionally lengthened those terms.

Similarly, Respondents' reliance on *Muhammad v. Close's* statement that *Heck* is irrelevant if the prisoner's claim "threatens no consequence for . . . the duration of his sentence," 124 S. Ct. 1303, 1304 (2004), does not help them. Once again, Respondents' claims do "threaten consequences" for the time they will serve. Their claims, if successful, would limit the quantum of time between release hearings, thus shortening the punishment imposed.

2. Nor is Dotson correct that because a new parole hearing would not necessarily "change the outcome," there is no invalidation. Dotson Br. at 29. That the parole hearing "might have come out the same way even if the [new] guidelines had not been invoked," or that it may come out the same way if the State conducts the hearing again, is simply irrelevant. *Id.* As noted above, it is the initial nullification of the state decision, even if the State may reach the same result again, that offends *Heck*.

And, in any event, Dotson's argument—that a new hearing following success on his claims may lead to the same

outcome—is also wrong on the facts. As noted above, application of the new guidelines would increase the frequency of release hearings, thereby shortening the time for earliest release after denial. Thus, success on his claims would change the outcome of his new hearing.

3. Respondents' argument that they are only seeking relief directed at future hearings, and thus do not trigger *Heck*, is similarly unavailing. Dotson Br. at 31-35; Johnson Br. at 42-45. *Heck* clearly teaches that the specific form of relief a prisoner seeks is irrelevant. The only question is the "necessary implication" of the federal judgment for the validity of a protected state decision. A judgment that the Ex Post Facto Clause prohibits using the guidelines in future hearings may not expressly invalidate the results of Respondents' prior guideline-based hearings, but it would be impossible to avoid the implication that those prior hearings were invalid. That is enough to trigger *Heck*.

To be sure, in *Balisok* the Court did note that declaratory relief directed at future hearings often will not offend *Heck*. But that is true only where the claimed error giving rise to relief—there the failure to time-stamp documents—"would not necessarily imply the invalidity" of earlier decisions. 520 U.S. at 650 (Ginsburg, J., concurring). The declaration Respondents seek here, however, would most certainly have that forbidden effect.

***

In sum, *Heck* and *Balisok* hold that a prisoner cannot "invalidate" a protected decision through a 42 U.S.C. § 1983 claim. Respondents' challenges to their parole decisions will, if successful, take those decisions off the books and prevent them from being reissued on alternate bases. That will "invalidate" those decisions under any understanding of that term.

B. Parole decisions are "sentencing decisions" for purposes of *Heck*.

Petitioners' opening brief explained that the parole decisions challenged here are integral parts of prisoners' sentences. They are formalized state determinations that a given prisoner will remain incarcerated, and will not be again considered for release for some specified period of time. Accordingly, Petitioners urged that those decisions are protected by *Heck's* prohibition against challenging sentences through § 1983. Petitioners' Br. at 20-31.

Respondents do not dispute that parole decisions directly impact the duration of confinement, but they nonetheless argue that such decisions do not count as sentencing decisions for *Heck's* purposes. They are wrong.

1. *Balisok* belies Respondents' suggestion that only judicial decisions count as sentences. See Johnson Br. at 28-34; Dotson Br. at 35-38. According to Johnson, "the actual sentence is for the maximum period imposed by the court." Johnson Br. at 30 (quotation omitted). Parole is not a "sentencing power," he says, but rather the power to commute an existing sentence. *Id.* at 31. In other words, Respondents argue that only the judge imposes the sentence, and that all subsequent decisions regarding how much of the sentence will be served are not "sentencing decisions," and thus do not count for *Heck's* purposes.

That bright-line rule, however, cannot be squared with this Court's decision in *Balisok*. *Balisok* applied *Heck* to bar a claim that, if successful, would undermine an administrative decision, thus making it clear that the doctrine is not limited to claims implicating court orders. *See also Spencer v. Kemna*, 523 U.S. 1, 17-18 (1998) (analyzing *Heck's* scope in a case involving a parole board decision).

2. Nor does it matter, as Respondents suggest, that prisoners do not receive at parole hearings the full panoply of rights afforded in criminal trials. Respondents argue that the lack of such rights means that parole decisions are not "sentencing decisions" (and thus are not protected by *Heck*). See Johnson Br. at 31-34; Dotson Br. at 36. But that argument starts from a faulty premise, and thus arrives at a faulty conclusion.

The argument presumes that full criminal trial rights must be afforded whenever state proceedings implicate a sentence. That is demonstrably untrue, as this Court has repeatedly upheld less demanding procedures in proceedings directly implicating criminal sentences. *Wolff v. McDonnell*, 418 U.S. 539, 567-571 (1974), rejected calls for trial-type rights in proceedings concerning sentence-shortening good-time credits. *Gagnon v. Scarpelli*, 411 U.S. 778, 787-790 (1973), upheld informal procedures in probation revocation proceedings. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), upheld minimal procedures in clemency proceedings. Those proceedings all directly implicated criminal sentences, and they and other precedents establish that a proceeding can do so without triggering full-fledged criminal protections. See also *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 369 (1998) (exclusionary rule inapplicable to parole revocation proceedings).

Those precedents are based on three principles that compel the same result here. The first is that the criminal trial rights Respondents discuss are required only when the State mobilizes its prosecutorial resources to deprive an individual of his liberty, not when proceedings instead seek to relieve the burdens of previously-imposed criminal liability. *Ross v. Moffitt*, 417 U.S. 600, 610-611 (1974). The second is that these protections are not necessary when the individual's liberty has already been constitutionally restricted. *Woodard*, 523 U.S at 280-282 (plurality opinion);

id. at 288-290 (O'Connor, J., concurring). A third is that the protections are not required when they would be incompatible with the nature of the decision to be made. *Gagnon*, 411 U.S. at 787-788; *Wolff*, 418 U.S. at 569-570.

All of those principles apply here. Parole proceedings are not initiated to deprive a prisoner of rights, but instead to consider granting freedom, and there is no prosecutorial effort to counterbalance. Further, parole proceedings occur only after someone has been deprived of liberty in proceedings where he received, or waived, full constitutional protections. Finally, this Court has correctly noted that trial-type procedures would be counterproductive in parole proceedings given the predictive and subjective decisions to be made there. *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1, 13-14 (1979). Thus, it is irrelevant that parole decisions are not accompanied by full trial rights.

In fact, accepting Respondents' argument that only those sentencing processes where a prisoner receives full trial rights are eligible for *Heck's* protection would be inconsistent with this Court's precedent. *Balisok* applied *Heck* to an administrative decision regarding good time credit, and no one has ever suggested that full trial rights apply at good time hearings.

Furthermore, accepting Respondents' narrow definition of "sentencing decision" would frustrate one of *Heck's* objectives. Barring federal review until state courts have an opportunity to review a prisoner's claim allows the federal courts to take advantage of state court expertise on issues of prison administration, an area "peculiarly within state authority and expertise." *Preiser*, 411 U.S. at 492. But, Respondents' proposed definition of sentence would cause exactly the opposite result, requiring federal courts to tackle the arcana of state parole administration before their state

counterparts, already familiar with that complicated subject, could pass on the propriety of disputed decisions.

In sum, none of Respondents' arguments overcome the simple truth that parole decisions directly impact the duration of confinement, and thus are an inherent and integral part of criminal offenders' sentences.

C. The intervening parole decisions further demonstrate why the Respondents' claims here are *Heck*-barred.

Both Respondents argue that their cases no longer threaten to invalidate decisions protected by *Heck* because their complaints attack parole hearings held in 1999 (Johnson) and 2000 (Dotson) and they have since received new parole hearings in 2002, hearings that were not expressly challenged in their complaints. Dotson Br. at 27-28; Johnson Br. at 24, 42-43. Their arguments fail for at least three reasons.

1. As Respondents concede, prisoners cannot escape *Heck* merely based on "what the prisoner asks for in his complaint." Dotson Br. at 19. Accord Johnson Br. at 19-20. Rather, as described above, what matters is the real world impact that success on the prisoner's claim would have on a protected state decision. If a win would imply the invalidity of a protected decision, the claim is barred, regardless of the details of the prisoner's complaint or the specifics of the relief requested. Consequently, it does not matter that that Respondents' complaints expressly targeted only the earlier decisions. Rather, the only question is whether success on their claims would invalidate a sentencing decision.

Here, success on Respondents' claims would have that effect, both on the earlier decisions and on the more recent ones. Respondents claim that any application of the parole

guidelines—guidelines adopted after they committed their crimes—to their parole hearings violates the Ex Post Facto Clause, making the resulting decisions so flawed as to require new hearings. Petitioners' Br. at 12-14; Dotson Br. at 5-6; Johnson Br. at 8. Those claims, if accepted, would be fatal to both the earlier and later decisions, as both sets were based on the same guidelines. Dotson Br. App. at 1a, line 3 and 3a, line 8(A); Johnson Br. App. at 1a, line 3 and 3a, line 8(A). Since, as discussed above, those decisions are sentencing decisions, Respondents' claims are *Heck*-barred because success on those claims would necessarily imply the invalidity of all these sentencing decisions.

2. Indeed, far from helping him here, the new parole decision in Dotson's case actually undercuts one of his primary arguments. Dotson asserts that the decision in his 2000 halfway review does not count for *Heck* purposes because it was not an actual parole decision, but was merely a scheduling decision determining when he would receive an actual parole hearing. Dotson Br. at 28-31. Whatever merits that argument may have had (and Petitioners do not concede it had any), it is now irrelevant as Dotson has received what even he recognizes as an actual parole release decision, one that was based on the guidelines he claims cannot be constitutionally applied to him. Hence the contingencies that Dotson argues insulate his claims from scrutiny under *Heck* have been removed.

3. Nor do the new hearings somehow undercut the *Heck* bar, as Respondents suggest, by making aspects of Respondents' claims "moot." See Dotson Br. at 28; Johnson Br. at 24. First, it is important to note that Respondents are not using the term "moot" in its traditional jurisdictional sense. Indeed, Johnson goes on at length as to why the case itself is not moot. See Johnson Br. at 24 n.18. That is not surprising as, if it is moot now, it was also moot at the time of the appeals court decision (circuit court arguments were

held, and the decision was issued, after the 2002 parole hearings occurred), requiring the decision below to be vacated as well. See *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 72-73 (1983).

Rather, Respondents are using the term in an attempt to peel away the aspects of their claims that they recognize most directly implicate *Heck*. Essentially, they are arguing that, because the old hearings have been "replaced" by new ones and thus are "moot," their claims, even if successful, will not invalidate anything. But that argument again simply ignores the impact that success on their claims would have on the new 2002 decisions. As noted above, the claims they advance, if successful, would invalidate the 2002 decisions, just like the earlier ones. That invalidation alone triggers *Heck*.

Moreover, even if the Court looks past the impact on the 2002 decisions, Respondents' "mootness" argument still fails to save their claims from *Heck's* bar. Respondents are essentially arguing that the earlier decisions have been "terminated" and thus cannot be "invalidated." If they are relying on "termination," however, they must show "favorable termination." See *Heck*, 512 U.S. at 486-487 (describing what counts as "favorable termination"). But Respondents have not done so here, as they have not shown that the new hearings resulted from any state determination that the prior hearings were defective (indeed they admit that the State applied the same guidelines at those later hearings). Thus, *Heck* still bars their claims.

D. Respondents' claims are cognizable in habeas and are therefore *Heck*-barred.

Petitioners' opening brief explained that *Heck* expanded on the rule, announced in *Preiser*, that claims covered by the habeas statutes should be routed through

those specific statutes rather than the more general provisions of § 1983. It also explained why Respondents' challenges to their parole decisions are well within the scope of the habeas statutes, and so are barred by *Heck's* broader rule. Petitioners' Br. at 31-39.

Respondents have not disputed *Heck's* gate-keeping function, or that it goes further than *Preiser*. Instead, they first seek to avoid the obvious relevance of their claims' cognizability in habeas by arguing that the question is not properly before the Court. As a fallback, they contend that their claims are not cognizable in habeas because they will not guarantee release. Both arguments are wrong.

1. Petitioners are not, as Dotson suggests, seeking reversal based on *Preiser* rather than *Heck*. See Dotson Br. at 39-41. Rather, as Petitioners explained in their opening brief, *Heck* reprises and extends *Preiser*, a fact Respondents do not dispute. Petitioners' Br. at 33-34; Dotson Br. at 18, 19; Johnson Br. at 19-20. It was therefore perfectly appropriate to discuss the relationship between those cases, as Respondents themselves do. Based on that relationship, however, it is clear that *Heck*, like *Preiser*, directs that claims that sound in habeas must be brought in habeas.

That aspect of *Heck* prevents Respondents from pursuing their § 1983 claims here for two reasons. First, Respondents request an immediate new parole release hearing. Whether or not they would be successful in actually obtaining release at that hearing is an open question. But, no one can dispute that they seek the hearing in hopes of attaining such release. Such claims are ultimately about release from confinement and thus sound, if at all, in habeas. Similarly, if Respondents are successful in their claims, the State would be required to use older parole guidelines under which Respondents would be entitled to parole determinations more frequently. This would again raise the

prospect of earlier release—deferring additional parole consideration for five years, rather than one year, would increase the average time of incarceration—even if the federal court order would not require such release per se.

2. Respondents' assertion that their claims are not cognizable in habeas because success on the claims would not guarantee release is contrary to both the plain language of the habeas statutes and this Court's precedents.

28 U.S.C. §§ 2241(c)(3) and 2254(a) authorize habeas relief when prisoners claim to be "in custody in violation of the Constitution" and that is exactly what these prisoners claim. Both are "in custody" for fixed periods of time because of disputed parole decisions. J.A. at 16, 17, 56; Dotson Br. at 4, 27-28; Dotson Br. App. 3a at line 8, 4a at line 9; Johnson Br. App. at 3a at line 8, 4a at line 9. Both want the decisions vacated because the quantum of punishment those decisions impose, i.e., the period they will need to serve before their next release hearing, is based on parole guidelines allegedly applied "in violation of the [Ex Post Facto Clause] of the Constitution." Respondents therefore claim both that they are "in custody," and that this custody is "in violation of the Constitution," bringing their claims squarely within the habeas statutes.

That success would not guarantee Respondents earlier release does not change that. Nothing in the language of §§ 2241(c)(3) or 2254(a) makes guaranteed release a precondition to seeking habeas. To the contrary, Congress deleted such a requirement, see Petitioners' Br. at 37-38, and this Court's precedents show that a prisoner's claim need not result in guaranteed release to be cognizable in habeas. The claims in *Garlotte v. Fordice*, 515 U.S. 39 (1995), and *Maleng v. Cook*, 490 U.S. 488 (1989), did not guarantee those petitioners immediate or expedited release, but merely sought to advance "the prisoner's date of potential release."

Garlotte, 515 U.S. at 43. The claim in *In re Bonner*, 151 U.S. 242 (1894), did not change that petitioner's release date, but only resulted in his serving his full sentence in a different prison. And the prisoner bringing *Braden v. 30th District Circuit Court*, 410 U.S. 484 (1973), did not seek release, but only a trial at which there was no guarantee of release. Yet this Court upheld the availability of habeas relief in each of those cases. Simply put, habeas has no "guaranteed impact on release" requirement.

Nor do the cases Respondents cite demonstrate otherwise. Although *Preiser* did state that claims having that effect are cognizable in habeas, it did not hold that only such claims are cognizable. While *Fay v. Noia*, 372 U.S. 391 (1963); *In re Medley*, 134 U.S. 160 (1890); *INS v. St. Cyr*, 533 U.S. 289 (2001); *Johnson v. Avery*, 393 U.S. 483 (1969); *Allen v. McCurry*, 449 U.S. 90 (1980); *Townsend v. Swain*, 372 U.S. 293 (1963), and *Peyton v. Rowe*, 391 U.S. 54 (1968), observed that habeas is generally concerned with illegal detention, none hold that a claim *must* compel release to fall within the habeas statutes. To the contrary, *Johnson v. Avery* sustained a habeas claim that did not challenge the petitioner's confinement, but only certain regulations preventing him from helping other prisoners prepare legal papers. 393 U.S. at 484. Thus, none of those authorities compel adoption of Respondents' suggestion that habeas extends only to those claims that will "ensure [a prisoner's] expedited release." Dotson Br. at 43.

The *Heck* doctrine is intended not only to protect state decisions, but also to route claims covered by the more specific habeas statutes through those procedures rather than the generalized provisions of § 1983. The Respondents' constitutional challenges to the decisions controlling their custody fit within the language of the habeas statutes, and

they have pointed to nothing justifying a departure from that language. That strongly supports the conclusion that their claims are *Heck*-barred.

E. Respondents' arguments notwithstanding, comity and federalism concerns do support routing the claims here through habeas.

Petitioners' opening brief explained that comity concerns, and in particular the need to avoid premature federal intervention in core state functions, supported their reading of *Heck*, as does the fact that Petitioners' approach would give State courts the chance to resolve many difficult parole release claims on state law grounds. Respondents make two arguments in response, but each fails.

1. Respondents' contention that comity cannot overcome the text of § 1983 is simply wrong. See Johnson Br. at 40. This Court has repeatedly held that claims within the textual scope of that statute can indeed be routed to the state courts for comity reasons. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 116-117 (1981); *Trainor v. Hernandez*, 431 U.S. 434, 446-448 (1977); *Juidice v. Vail*, 430 U.S. 327, 338-339 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 612-613 (1975); *Younger v. Harris*, 401 U.S. 37, 54 (1971); *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951). Each of those cases was brought under § 1983, and in each, as in *Preiser*, the Court held that the claims should be pressed in state court proceedings even though they fell within the literal scope of § 1983. Respondents are therefore wrong to suggest that comity concerns must inevitably yield to the text of § 1983.

2. Respondents are also wrong to suggest that deferring § 1983 review in order to allows resolution of claims on state law grounds is impermissible. Dotson Br. at 50. This Court has repeatedly held that cases brought under

§ 1983 are better left to state courts for consideration under state law if that is likely to resolve the underlying dispute. *Bellotti v. Baird*, 428 U.S. 132, 146-147 (1976); *Pennzoil Co. v. Texaco*, 481 U.S. 1, 10-12 (1987).

Submissions in this Court show the unique utility of doing so in the parole context. Ohio's courts have not hesitated to vindicate prisoners' state law rights in the parole process, see e.g. *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St. 3d 456 (2002), and that trend has continued with the recent decision in *Ankrom v. Hageman*, Case No. 01CVH02-1563 (Franklin Co. C. P., Aug. 31, 2004) (attached to the "Amicus Brief on behalf of 2,974 Current and Former Inmates"). Together, those cases have resolved thousands of potential § 1983 claims on state law grounds. The fact that such resolutions are available through the state courts strongly supports Petitioners' reading of *Heck*, a reading that would steer such claims to the state courts.

CONCLUSION

For the above reasons, as well as those stated in Petitioners' opening brief, the judgments below should be reversed.

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In the
Supreme Court of the United States

REGINALD WILKINSON, Director, et al.,
Petitioners,

v.

WILLIAM DWIGHT DOTSON, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, DELAWARE, GEORGIA, HAWAII, IDAHO, ILLINOIS, KANSAS, MARYLAND, MASSACHUSETTS, MISSISSIPPI, NEBRASKA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, VIRGINIA, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does *Heck v. Humphrey* permit a prisoner to bring a § 1983 action claiming that his parole proceedings violate due process, even though success on the merits of this claim would result only in a new parole hearing and would not necessarily guarantee earlier release from prison?

2. Does a federal court judgment ordering a new parole hearing "necessarily imply the invalidity of" the decision at the previous parole hearing, for purposes of *Heck v. Humphrey*?

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INTEREST OF AMICI CURIAE

Pursuant to Sup. Ct. R. 37.4, amici curiae States of Alabama, Alaska, Delaware, Georgia, Hawaii, Idaho, Illinois, Kansas, Maryland, Massachusetts, Mississippi, Nebraska, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, and West Virginia respectfully submit this brief in support of petitioner State of Ohio. Sitting en banc, the United States Court of Appeals for the Sixth Circuit concluded that the respondents could pursue under 42 U.S.C. § 1983 claims alleging constitutional improprieties in their respective parole proceedings. Amici contend that a petition for a writ of habeas corpus, filed under 28 U.S.C. § 2254, is the sole remedy in federal court for such claims and, therefore, urge reversal of the judgment below.

This Court has recognized that "the reason why only habeas corpus can be used to challenge a state prisoner's underlying conviction is the strong policy requiring exhaustion of state remedies in that situation – to avoid the unnecessary friction between the federal and state court systems that would result if a lower federal court upset a state court conviction without first giving the state court system an opportunity to correct its own constitutional errors." *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973) (citing *Fay v. Noia*, 372 U.S. 391, 399 n.5 (1963)). Moreover, such "comity considerations are not limited to challenges to the validity of state court convictions ...." *Id.* at 491. Rather, they have "as much relevance in areas of particular state administrative concern as [they do] where state judicial action is being attacked." *Id.* The administration of parole is unquestionably a vital part of state correctional systems. Thus, amici submit this brief in defense of "[t]he strong considerations of comity that require giving ... the States the first opportunity to correct the errors made in the internal administration of their" various parole procedures. *Id.* at 492.

STATEMENT OF THE CASE

1. Respondent William Dwight Dotson is serving a life sentence in an Ohio prison for aggravated murder. His first parole hearing was held in 1995; parole was denied. At the time, his next parole hearing was scheduled for 2005, but in 1998, the Ohio Adult Parole Authority revised its guidelines in such a manner that Dotson was unlikely to be paroled until 2013 at the earliest.

Dotson sued in federal district court under § 1983, claiming that the parole board had violated his rights by applying the new guidelines. He sought a declaration that he was entitled to the benefit of the old guidelines and a mandatory injunction requiring the parole board to give him a "prompt and immediate parole hearing" pursuant to those guidelines.

2. Respondent Rogerico J. Johnson is serving a 10-30 year sentence in an Ohio prison for aggravated robbery. His first parole hearing was held in April 1999. He, too, was denied parole. Johnson claims that the hearing violated his rights in several ways. Specifically, he contends (i) that just one parole board member conducted the hearing, while Ohio law requires the presence of a hearing officer, as well; (ii) that he was not allowed to speak on his own behalf; and (iii) that the board member based his decision to deny parole on crimes for which Johnson was never charged or convicted.

Like Dotson, Johnson sued in federal district court under § 1983 seeking declaratory and injunctive relief. Specifically, he sought to set aside the decision denying him parole and to have an immediate, new hearing.

3. In both cases, the district courts dismissed the § 1983 actions; habeas corpus, the district courts held, was the sole remedy available to respondents. Both Johnson and Dotson appealed. Their appeals were ultimately consolidated and heard en banc by the United States Court of Appeals for the Sixth Circuit. *Dotson v. Wilkinson*, 329 F.3d 463 (6th Cir. 2003) (en banc). That court reversed.

The majority of the en banc panel reasoned that the most each prisoner would gain by prevailing on his § 1983 lawsuit was a new hearing – and not necessarily an earlier release. *Id.* at 470. A § 1983 claim "necessarily implies the invalidity of a prisoner's conviction or sentence," the court held, only if it "will inevitably or automatically result in [an] earlier release." *Id.* at 471. Because, the court concluded, respondents' requests for new parole hearings would not "inevitably or automatically" result in their earlier release from prison (parole might again be denied), the bar imposed by *Heck v. Humphrey*, 512 U.S. 477 (1994), did not apply. The dissenting judges, by contrast, maintained that *Heck* barred all § 1983 claims that would "imply the invalidity of any state criminal judgments relating to the length of a prisoner's incarceration" – including "judgments" of state parole boards – whether or not a favorable resolution of the claim would itself automatically entitle the prisoner to an earlier release. 329 F.3d at 474.

SUMMARY OF THE ARGUMENT

This case is controlled by *Heck's* jurisprudential forebear, this Court's foundational decision in *Preiser v. Rodriguez*, 411 U.S. 475 (1973). There, this Court held, in no uncertain terms, that when an inmate challenges the fact or duration of his physical confinement and "seeks ... immediate release or a speedier release," his "sole remedy is a writ of habeas corpus." *Id.* at 500. Here, on any meaningful understanding of the term, respondents are assuredly "seek[ing]" speedier release from prison. Specifically, they are "seek[ing]" parole, which this Court has accurately defined as "release from prison, before the completion of sentence ...." *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). Indeed, even the court of appeals below recognized that "an incarcerated person obviously *seeks* to be released from confinement" and that he "cares not a whit as to how that happens ...." *Dotson v. Wilkinson*,

329 F.3d 463, 472 (6th Cir. 2003) (en banc) (emphasis added). That fact, under *Preiser*'s plain language, is conclusive, and forbids respondents' resort to § 1983.

What this Court in *Preiser* called the "policy reasons underlying the habeas corpus statute," 411 U.S. at 490, further confirm that decision's applicability here. Specifically, the habeas statute's exhaustion requirement counsels in favor of allowing state courts to address in the first instance alleged errors regarding a state prisoner's term of imprisonment. *See id.* It does not matter that respondents are not frontally attacking their convictions, but are instead challenging an administrative decision concerning their parole (and thus prospects for release). *Preiser* makes clear that the rule of exhaustion, which is "rooted in considerations of federal-state comity," has "as much relevance in areas of particular state administrative concern as it does where state judicial action is being attacked." *Id.* at 491. Further, like the questions of prison administration that this Court faced in *Preiser*, parole is an issue "intricately bound up with state laws, regulations, and procedures." *Id.* at 491-92. And, indeed, given that parole does not even exist in the federal system, state courts are arguably better situated than federal courts to address – at least as an initial matter – parole-related claims. Simply put, if there is any group of claims that it makes sense to filter through the state courts (by way of the habeas statute's exhaustion requirement), it is claims involving parole eligibility and suitability.

ARGUMENT

This case presents the Court yet another opportunity to address questions arising at the "intersection" of 42 U.S.C. § 1983 and the habeas corpus statute, 28 U.S.C. § 2254. Specifically, this Court must determine whether respondents' parole-related claims may proceed under § 1983, or whether, instead, respondents must pursue those claims on habeas.

I. *Preiser* Governs Suits Seeking Equitable Relief From Confinement and Precludes Respondents' Section 1983 Claims.

Since its pathmarking decision in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), this Court has had occasion to deal with the § 1983-habeas "intersection" on numerous occasions. *See, e.g., Heck v. Humphrey*, 512 U.S. 477 (1994); *Edwards v. Balisok*, 520 U.S. 641 (1997); *Muhammad v. Close*, 124 S. Ct. 1303 (2004). *Preiser*, however, remains the fountainhead. A proper resolution of this case begins and ends with *Preiser*.

Initially, the fact that respondents' claims may fit within the broad language of § 1983 is not determinative of the issue presented. "[D]espite the literal applicability of [§ 1983's] terms, the question remains whether the specific federal habeas corpus statute, ... designed to provide the means for a state prisoner to attack the validity of his confinement, must be understood to be the exclusive remedy available in a situation ... where it ... clearly applies." *Preiser*, 411 U.S. at 489. This Court has, of course, concluded that habeas is the sole federal remedy in that circumstance. *See id.* at 490 ("Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983."). Indeed, a contrary result would sanction the circumvention of limitations (among them, the exhaustion of state remedies) intentionally imposed on the

availability of habeas relief. Accordingly, the rule coming out of *Preiser* is straightforward: If a claim fits within the habeas statute's ambit, § 1983 is not an available remedy.

But what is the nature of the field that the habeas statute occupies? At least for purposes of this case, *Preiser* answers that question, as well. In *Preiser*, this Court considered whether the claims of three state prisoners regarding "good-conduct-time credits" were cognizable under § 1983. 411 U.S. at 476. Specifically, the inmates sought injunctive relief restoring credits they asserted had been unconstitutionally revoked. Concerning the scope of habeas corpus (and, by mirror image, § 1983), the *Preiser* Court "h[e]ld ... that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." *Id.* at 500. Indeed, this Court underscored that where a prisoner's claim "goes directly to the constitutionality of his physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration," it is within "the core of habeas corpus" and, thus, by definition, outside the scope of § 1983. *Id.* at 489.

So, then, do respondents' claims here "challeng[e]" or "go[] to" the duration of their confinement and "seek[]" speedier release? That question virtually answers itself. The ordinary meaning of the term "seek," as used by this Court in *Preiser*, fits respondents' claims to a tee: "To try to obtain (something advantageous); to try to bring about or effect (an action, condition, opportunity, or the like." 14 *Oxford English Dictionary* 876-77 (2d ed. 1989). Respondents, to be sure, are "[t]ry[ing] to obtain" or to "bring about" an "advantageous" "condition" – namely, parole. And we are not just playing word games here. The court of appeals itself emphasized (correctly) that "an incarcerated person obviously *seeks* to be released from confinement," and that he "cares not a whit as to how that

happens ...." *Dotson*, 329 F.3d at 472 (emphasis added). Under *Preiser*'s plain language, that fact is determinative.

The Sixth Circuit took what should have been a relatively simple case – inasmuch as it is governed by this Court's binding precedent – and made it harder. The court of appeals managed to evade *Preiser*'s clear rule only by ignoring what it "kn[ew] on a human level [was] certainly there" – namely, a request for early release – and by focusing not on what the prisoner-plaintiffs were actually "seek[ing]" (as *Preiser* itself requires) but, instead, on the question whether their claims would "inevitably or automatically result in earlier release." *Id.* at 471-72. Because, the court reasoned, respondents' challenges here would only "result in a new hearing" and because "parole is discretionary," there was no scientific, statistical certainty that earlier release would result. *Id.* at 470.

That, with all respect, is the height of formalism. There simply is no conceivable reason, other than for the purpose of obtaining earlier release from his confinement, that an inmate would go to the trouble of challenging the parole procedures applied to him. As this Court has accurately described it, "[t]he essence of parole is release from prison, before the completion of sentence ...." *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). Because respondents' parole-based challenges plainly "seek[]" early release from prison, they fall squarely within *Preiser*'s mandate that they proceed on habeas. *See* 411 U.S. at 489, 500. The Sixth Circuit's contrary holding not only contravenes *Preiser*, but has no footing in reality.[1]

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[1] The issue here has also arisen in the context of inmates seeking access to DNA evidence for testing – the question being whether such a suit may be brought under § 1983 on the ground that it does not inevitably, automatically, necessarily invalidate the underlying conviction. In such a case, there is, of course, a "scientific possibilit[y]" that the results of DNA tests may be "inconclusive," "insufficiently exculpatory," or even "inculpatory." *Harvey v. Horan*, 285 F.3d 298,

There is one final point that deserves mention. The logic underlying the Sixth Circuit's decision here – that where an inmate's suit will not "inevitably or automatically" result in his release it may proceed under § 1983 – has ripple effects that radiate well beyond the parole context. Indeed, the court of appeals' reasoning applies equally to a prisoner's action challenging his criminal conviction per se. That prisoner's suit, even if successful, will not (at least in the normal course) "inevitably or automatically" result in his freedom; instead, it will win him a re-trial – at which, of course, he may well be re-convicted. But surely no one would contend, based on the inherent uncertainty of criminal litigation (and, thus, the possibility of a second conviction), that an inmate could file a § 1983 action frontally attacking his conviction and demanding a new trial. That action – perhaps more than any other – plainly sounds in habeas. The Sixth Circuit's decision, which would apparently put even that suit on the § 1983 side of the line, would empty the habeas statute of any real meaning.

II. Nothing in *Heck* Suggests a Different Analysis or Result.

The court of appeals reached the strained result it did by fastening on language in *Heck v. Humphrey* to the effect that a claim must proceed on habeas if it would "necessarily imply the invalidity" of his conviction or sentence. 512 U.S. at 486-87. Again, by the Sixth

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308 (4th Cir. 2002) (Luttig, J., opinion respecting denial of rehearing en banc). There is no basis, however, for slicing the bologna so thin. As Judge Wilkinson correctly emphasized in holding for the Fourth Circuit that DNA requests must proceed on habeas, an inmate seeks DNA evidence "for one reason and one reason only – as the first step in undermining his conviction." *Harvey v. Horan*, 278 F.3d 370, 375 (4th Cir. 2002). The same is true of respondents' challenges to their parole proceedings. They seek new parole hearings for one reason and one reason only – as the first step toward obtaining early release.

Circuit's reasoning, a claim only "necessarily impl[ies] the invalidity" of an inmate's incarceration when it will "inevitably or automatically result" in earlier release. *Dotson*, 329 F.3d at 471. The court of appeals' reliance on *Heck*'s "necessarily imply" language was misplaced, for at least two reasons. First, the *Heck* Court did not walk away from, but instead embraced and reiterated, *Preiser*'s holding that "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and *seeks* immediate or speedier release ...." 512 U.S. at 481 (citing *Preiser*, 411 U.S. at 488-90) (emphasis added). Because all seem to agree that respondents are "seek[ing]" early release, *see supra* at 6-7, their suits are not cognizable under § 1983.

Second, even to the extent that *Heck* purports to establish a standard different from the one articulated in the watershed *Preiser* decision, *Heck* is by its own terms inapplicable to respondents' complaints here, which request mandatory injunctive relief (in the form of new parole hearings at which they surely hope to secure early release from prison). What the passage from *Heck* on which the Sixth Circuit seized actually says is that "*when a state prisoner seeks damages in a § 1983 suit*, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." 512 U.S. at 487 (emphasis added). Indeed, the *Heck* Court emphasized that Roy Heck's case was "clearly not covered by the holding of *Preiser*" for the very reason that he had *not* sought injunctive relief from a sentence but had instead sought "monetary damages, as to which he could not 'have sought and obtained fully effective relief through federal habeas corpus proceedings.'" *Id.* at 481 (quoting *Preiser*, 411 U.S. at 488). Put simply, *Preiser* is an injunctive-relief case, *Heck* was a damages case. *See generally Heck*, 512 U.S. at 478 ("damages"), 481 (same), 482 (same), 483 (same), 486 (same), 487 (same), 488 (same), 489 (same), 490 (same); *see also Muhammad*, 124 S. Ct. at 1304 (*Heck* rule applies to "§ 1983 damages action[s]").

Because respondents here have sought injunctive relief, this, in short, is a *Preiser* case, not a *Heck* case. And for all of the reasons explained in Part I above, because respondents' parole-related challenges "go[] to" their confinement and "seek[]" speedier release, they must proceed via habeas; they are not cognizable under § 1983.

To the extent that the *Preiser* standard (which applies to claims for injunctive relief) sweeps more broadly, and precludes more § 1983 actions, than does the *Heck* rule (applicable to damages claims), there is good reason. There is a very real difference in the extent to which each type of suit – for damages on the one hand, for injunctive relief on the other – should be viewed as circumventing the habeas statute and its attendant restrictions. In the case of a plaintiff who seeks only a damages remedy for an allegedly unconstitutional conviction or sentence, the circumvention of the habeas statute occurs, if at all, only by indirection. The damages plaintiff could not have obtained the monetary relief he seeks in a habeas proceeding, *see Preiser*, 411 U.S. at 488, and his suit, even if successful, will not *ipso facto* give him the equitable relief that habeas corpus was designed to provide; rather, to complete the cycle of circumvention, he will have to file a second suit for injunctive relief and convince a second judge to give the § 1983 damages judgment preclusive, precedential, or persuasive effect. In stark contrast, a plaintiff who files a § 1983 action seeking injunctive relief from his conviction or sentence – *the very relief he could have sought in a habeas corpus petition* – essentially thumbs his nose at the habeas statute's requirements.

The two situations are different, and they call for different rules. It makes sense to give more leeway – in the form of a rule that forecloses only those claims that "necessarily imply" a judgment's invalidity – to a § 1983 plaintiff who wants only money, and whose suit therefore may be used only indirectly (if at all) to circumvent traditional habeas rules and restrictions. By the same token, a stricter rule – one that broadly prohibits all claims "seek[ing]" release from confinement – is

warranted in the case of suits for injunctive relief from state convictions or sentences, in which the circumvention of the habeas statute is patent, immediate, and certain to occur.[2]

In any event, the important point here is that no matter what standard *Heck* may have established for § 1983 suits seeking damages – and no matter why the *Heck* standard may be more permissive than *Preiser*'s – respondents' requests for injunctive relief are governed by *Preiser*, not *Heck*. Accordingly, respondents' claims "seek[ing]" early release from confinement are not cognizable under § 1983.[3]

---

[2] The fact that respondents here also sought declaratory relief does not change matters. Just as the demand for declaratory relief in *Edwards v. Balisok*, 520 U.S. 641 (1997), was for all practical purposes adjunct to the request for damages – this Court twice referred to Balisok's "claim" (singular) for "damages and declaratory relief," *id.* at 643, 648 – respondents' demands here for declaratory relief do not stand alone, but are instead part and parcel of their principal requests for mandatory injunctive relief. However their requests for relief are characterized, respondents seek precisely the sort of equitable relief available under the habeas statute; accordingly, *Preiser* controls. In any event, this Court has recognized that declaratory relief can be every bit as injurious to States' comity interests as injunctive relief. *See, e.g., Samuels v. Mackell*, 401 U.S. 66, 71-72 (1971) ("[O]rdinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the longstanding policy limiting injunctions was designed to avoid.").

[3] In *Balisok*, this Court suggested in dicta that *Heck* might apply to a claim seeking "prospective injunctive relief." 520 U.S. at 648. The issue, however, was "neither briefed nor argued" nor definitively decided by the Court. *Id.* at 649. Respondents in this matter, moreover, do not seek "prospective injunctive relief" in the *Balisok* sense – *i.e.*, purely forward-looking, systemic relief. Rather, they seek the invalidation of administrative decisions already made regarding their own parole statuses.

III. Considerations of Federalism and Comity Counsel Dismissal of Respondents' Claims.

Preiser's "hold[ing]" – that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus," 411 U.S. at 500 – is buttressed by what this Court there called the "policy reasons underlying the habeas corpus statute," *id.* at 490. Specifically, the habeas statute's exhaustion requirement "avoid[s] the unnecessary friction between the federal and state court systems that would result if a lower federal court upset a state court conviction without first giving the state court system an opportunity to correct is own constitutional errors." *Id.* (citing *Fay*, 372 U.S. at 399 n.5). Thus, considerations of comity and federalism weigh heavily in favor of allowing state courts to address, in the first instance, alleged errors regarding a prisoner's term of imprisonment. *See, e.g., O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (2001) ("Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief.").

As noted above, "[t]he essence of parole is release from prison, before the completion of sentence ...." *Morrissey*, 408 U.S. at 477. Accordingly, parole bears directly on a state prisoner's continued confinement. The parole power is a mechanism by which to regulate "the length of confinement" – a subject at "the heart of habeas corpus." *Preiser*, 411 U.S. at 498. Because of its integral role in the penological system, and because it bears so directly on a prisoner's continued confinement, the prospect of parole is, for purpose of the questions presented here, part and parcel of the sentence imposed. *Cf. Rummel v. Estelle*, 445 U.S. 263, 280-81 (1980) (rejecting claim that a life sentence imposed under a Texas recidivist statute violated the Eighth Amendment, in part, on the basis that

the sentence carried a "possibility of parole"). It is without question that a state prisoner may not bypass the exhaustion requirement when challenging the validity of his or her sentence. *See Heck*, 512 U.S. at 481 ("[H]abeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release."). He or she should similarly be precluded from circumventing the limitations on habeas relief when challenging the application of a State's parole proceedings.

The fact that an administrative decision is at issue here – as opposed to a judicial determination – makes no difference to the analysis. This Court has expressly refused to limit the scope and importance of the exhaustion requirement to state judicial determinations. *Preiser*, 411 U.S. at 491. Rather, "[t]he rule of exhaustion in federal habeas corpus actions is rooted in considerations of federal-state comity ... and it has as much relevance in areas of particular state administrative concern as it does where state judicial action is being attacked." *Id.* Thus, it is as important to Ohio's administration of its parole procedures as it would be if respondents were directly attacking their convictions.

At the risk of belaboring the obvious, Ohio has a strong interest in supervising the application of its own parole procedures. In dismissing the § 1983 claim seeking restoration of good-time credits in *Preiser*, this Court had difficulty "imagin[ing] an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Id.* at 491-92. The reasoning underlying the Court's conclusion in that regard applies equally with respect to state parole proceedings. Without question, parole is an area "intricately bound up with state laws, regulations, and

procedures ...." *Id.* Because, moreover, parole does not exist in the federal system,[4] state courts are arguably better equipped than federal courts to consider – at least as an initial matter – parole-related claims. Put simply, issues arising out of parole proceedings are "most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar [with the state specific procedural requirements] and in a better physical and practical position to deal" with such matters. *Id.*

There is no logical basis upon which to divorce the policy reasons underlying the habeas corpus statute from a State's parole proceedings. "Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking ... the length of their confinement ...." *Id.* at 490. Because, as noted, the very "essence of parole is release from prison, before the completion of sentence," *Morrissey*, 408 U.S. at 477, parole bears directly on the "length of confinement" – a matter at "the core of habeas corpus," *Preiser*, 411 U.S. at 489. Thus, "[t]he strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own error ... also require giving the States the first opportunity to correct any errors made in the internal administration" of their respective parole procedures and determinations. *Id.* at 492.

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[4] Parole was abolished in the federal system by the Sentencing Reform Act of 1984, Pub.L. No. 98-473, 98 Stat.1987, tit. II, ch. II, § 212(a)(2).

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States

REGINALD WILKINSON, Director, et al.,

Petitioners,

v.

WILLIAM DWIGHT DOTSON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF ON BEHALF OF 2,974 FORMER AND CURRENT OHIO INMATES AND NAMED PLAINTIFFS IN MICHAEL V. GHEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Heck v. Humphrey, 512 U.S. 477 (1994), holds that a prisoner cannot advance a claim under 42 U.S.C. § 1983 where success on that claim would "necessarily imply the invalidity of his conviction or sentence . . . unless . . . the conviction or sentence has already been invalidated." (*Heck*, 512 U.S. at 487). This has come to be known as *Heck's* "favorable termination requirement." The following questions are presented.

1. When a prisoner invokes § 1983 to challenge parole proceedings, does *Heck's* "favorable termination requirement" apply where success by the prisoner on the claim would result only in a new parole hearing and not necessarily guarantee earlier release from prison?

2. Does a federal court judgment ordering a new hearing necessarily imply the invalidity of the decision at the previous parole hearing for purposes of *Heck v. Humphrey*.

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OHIO PAROLE BOARD GUIDELINES, DECISION FORMS, AFFIDAVIT

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INTEREST OF *AMICI CURIAE*

2,974 currently incarcerated or former Ohio inmates respectfully submit this *amici curiae* brief pursuant to Sup. Ct. R. 37.3[1] in support of the Sixth Circuit's *en banc* decision[2] and the causes of Respondents William Dwight Dotson and Rogerico Johnson.

Respondent Dotson is one of 2,974 Named Plaintiffs in a complex and all-encompassing class action suit titled *Michael v. Ghee*,[3] challenging procedures of Ohio's Adult Parole Authority [hereafter *Parole Board*]. *Michael v. Ghee* was filed July 20, 2001. This litigation is nearly decisional. An indefinite stay has been imposed pending the outcome of *Wilkinson v. Dotson*. If Petitioners' prevail, our lawsuit could be dismissed.

This brief can be of assistance because of new evidence developed in *Michael v. Ghee* uncovering Parole Board practices. To avoid redundancy, our arguments are framed by authority from Ohio's Supreme Court construing parole guidelines, Department Policies, Parole Guidelines, parole panel decisions, one Parole Board affidavit

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici* represents that it authored this amici brief, and no counsel for any party in this case authored this brief in whole or in part. Further, no entity other than *amici*, their members or their counsel made a monetary contribution to the preparation or submission of this brief. Written consent for amici curiae participation was granted by counsel of record for all parties. Letters reflecting this consent have been filed with the Clerk pursuant to Sup. Ct. R. 37.2(a).

[2] *Dotson v. Wilkinson*, 329 F. 3d 463 (6th Cir. 2003) (en banc).

[3] *Michael v. Ghee*, Case #3:01CV7436, U.S. District Court, N. D. of Ohio, hereafter *Michael v. Ghee*.

and a class action trial court decision on state issues. Discussion of U.S. case law has been held to a minimum.

SUMMARY OF ARGUMENT

Heck's maxim dictates that a prisoner cannot advance a claim under 42 U.S.C. § 1983 (hereafter *§ 1983*) where success on the merits would "*necessarily imply*" invalidity of the conviction or sentence. Ohio's Parole Board is virtually autonomous and ungovernable. This agency's intervening presence and broad discretion derails any causal connection between success in federal court and the possibility of invalidating any state decision. A favorable ruling for an inmate by Ohio's Supreme Court, enforced by the trial court Judge one month later, failed to result in a prompt discharge or even a routinely granted parole.[4] Such is the power of Ohio's Parole Board, fourteen months and three parole hearings were required before Gerald Houston left prison. Claims should not be consigned to the habeas corpus statute on a speculative chance of engaging its relief. The term *necessarily* means *inevitable*. Given Gerald Houston's recent experience, we cannot imagine a parole related decision issued by *either* a state or federal court that could navigate Ohio's parole process and *inevitably result* in a new sentence or conviction.

[4] *See Layne v. Ohio Adult Parole Authority*, 97 Ohio St. 3d 456 (Oh. 2002), (hereafter *Layne*.) Gerald Houston should have served 10 to 15 years. *See Layne*, 97 Ohio St. 3d at 460. At the time of deciding *Layne*, he had served 20 years and 10 months. In January of 2003, Allen County Judge Warren ordered a new hearing consistent with *Layne*. On March 22, 2004, 14 months later, Mr. Houston was paroled.

The *favorable termination requirement* of *Heck* has been pounded and molded in the State's prosecutorial presses until it has been separated completely from its malicious prosecution context and transformed into its own absolute and insular maxim. In its finished state, this clause has emerged to become a frighteningly efficient means for performing one chilling task – dismissing inmate complaints without addressing their merits. Two District Court decisions on this docket attest to its resourcefulness as legal weaponry. *Heck's favorable termination requirement* needs to be abandoned. Even a tightly construed remnant of this clause will continue to wreck havoc in legal trenches.

There is poetic justice in having two inmates before this Court. Each claim illustrates a major ailment in administration of Ohio's criminal law. Dotson's case exposes a macro trend of Parole Boards to surreptitiously impose a sentencing scheme of their own creation upon inmates, reducing judicial decrees to vain acts in a wholesale, sweeping fashion. Johnson's case describes how a single judgment can be compromised, showing on a micro scale how judicial authority is overruled. Placed side by side, a picture emerges of the full process. On a Richter scale measuring contempt for the Judiciary, these facts rival the noxiousness of *Mapp v. Ohio*.[5] We urge this Court to adopt a finding not contemplated when certiorari was granted. While inmates have no vested interest in parole, every inmate deserves a *meaningful parole hearing*. When Parole Boards have authority to continue an inmate ten years or for any period that is not remedial, inmates

[5] 367 U.S. 643 (1961).

should have a vested *and protected* liberty interest in a meaningful parole hearing mandating the procedural safeguards described in *Wolff v. McDonnell*.[6] *Wolff's* protections are urgently needed to restore judicial primacy and curb parole abuses.

ARGUMENT I – CHALLENGING ELIGIBILITY CRITERIA

If a prisoner's claim for relief cannot be granted under the restrictive habeas statute, but does qualify under the civil rights statute due to a violation of the U.S. Constitution's Ex Post Facto Clause, this claim should be cognizable under § 1983.

Postponing Parole Eligibility from 2000 to 2012

Dotson was denied parole after serving 15 years. Under guidelines in force at the time of his conviction, he was entitled to another hearing within 5 years. In 1998, new guidelines were adopted and applied retroactively. Dotson must now serve 17 years before receiving serious parole consideration. He is challenging the eligibility criteria governing his suitability for release. Dotson's claim should be cognizable under § 1983 for two reasons: (1) under the restrictive habeas statute, purely prospective relief aimed at forcing prison officials to follow different procedures in the future cannot be granted; and (2) the merits of Dotson's case – his parole suitability – are not part of his claim; hence, there is no *pertinent* state decision to invalidate.

[6] 418 U.S. 539, at 563-570 (1974), hereafter *Wolff*.

Even the Sixth Circuit's *en banc* dissent found merit in Dotson's claim.

> "His [i.e. Dotson's] appeal is a classic claim for using the wrong procedures, not for reaching the wrong result. Further support for this conclusion comes from the fact that Dotson's lawsuit could just as easily have been cast as a class action claim challenging the retroactive application of Ohio's parole eligibility guidelines. This would have placed the case in the same posture as that presented in *Wolff* [*Wolff v. McDonnell*, 418 U.S. 539 (1974)], requesting prospective injunctive relief that seems clearly permissible under the Court's rule."[7]

Dotson's claim *is* the nucleus of *Michael v. Ghee*. His predicament – receiving a Parole Board continuance exceeding his trial court minimum sentence – affects every category of crime and every kind of Ohio prisoner including first time offenders.

Granting Administrators Authority to Overrule Judges

In federal court, it would be unthinkable to apply a sentencing guideline suitable for attempted murder when the offender is guilty of assault. In Ohio, parole panels have authority to make upward departures of this kind, achieving a result indirectly that the state could not

[7] *Dotson v. Wilkinson*, Appendix A, at p. 29a.

realize in court.[8] Provisions conferring this authority appear below.

> "The guidelines set forth the customary range of time to be served before release for various combinations of offense (seriousness) and offender (risk of recidivism) characteristics. The Parole Board may depart from the applicable guideline range for 'good cause' provided the specific written reasons for the departure are recorded and a copy given to the offender.
>
> "The Parole Board intends that the guideline ranges apply to 'heartland' cases, the typical cases that embody the conduct and circumstances that fall within the particular guideline range. In an atypical case, a case to which a particular guideline linguistically applies but where the conduct or circumstances differ significantly from the norm in an important way, the Board may depart from the guideline range." (p. 70)
>
> "(a) *In General*. The Parole Board may render a decision outside the guidelines for good cause provided that the offender is furnished, in writing, with a specific explanation for such action. It is in the Parole Board's discretion to render a decision above or below the guidelines provided that there exists an aggravating or mitigating factor(s) sufficient to warrant a decision and provided the specific reasons for the decision are adequately explained in the notice of the Parole Board's action . . . "[9] (p. 75)

[8] Petitioners concede this authority to make departures. *See* Brief for Petitioners at p. 7.

Petitioners offer no apologies for departing from court decrees. A blessing from this Court has been advanced for exercising this authority.[10] It is axiomatic that a parole candidate must first enter their assigned guideline before becoming entitled to serious release consideration. This rule is rigidly applied.[11] An upward departure bonds parole eligibility to a new crime. This new crime engages a higher guideline. Parole eligibility *and* suitability are on hold for the duration of the guideline engaged by the trial court conviction. In this manner, parole panels overrule court judgments with a conviction of their own making, coupled

[9] *See* Amici Brief for Respondents, Appendix IV, Ohio Parole Board Guidelines, at p. 70 and 75. An excerpt of these guidelines is in the Docket (*See* Joint Appendix pp. 27-30, Exhibits D, E) and Petitioners reference the entire manual via a website address (*See* Brief for Petitioners at p. 6, fn. 2). Amici's certified copy of the parole guidelines includes hand written notations and numerous deletions missing from the online version. Amici further requests permission to make the *Ohio Parole Board Decision* form, in use from 1998 to 2002, part of the record as Appendix I; and the *Ohio Parole Board Decision Sheet*, in use from 2003 to present, part of the record as Appendix II. For good cause, the guidelines are much more meaningful when examined with these forms. No prejudice can accrue to Petitioners, for they have designed these forms and use them. Appellate courts may consider judicially noticeable government documents not advanced below. *See* Brief for Petitioners at p. 8 fn. 3 [where two government documents are added as a supplement.]

[10] Brief of Petitioners, at pp. 20-22. ["Thus, parole officials exercise sentencing discretion and make sentencing decisions."]

[11] *See Michael v. Ghee*, Document No. 209, Plaintiffs' Exhibit 132, Affidavit of George Brehm (Exhibit I) Mr. Brehm served 116 of 120 months [96%] of his minimum guideline. Because he was not within his guideline, he did not receive serious consideration for parole.

with an amended sentence postponing parole consideration for years. Upward departures invalidate the trial court's parole eligibility term, part of the sentence. *Heck's* maxim is being challenged – by the Parole Board, not by inmates.

Embedded State Decision Construing Parole Eligibility

Inmates challenged Parole Board authority to make upward departures. Three cases were consolidated and heard by Ohio's Supreme Court. After parole hearings, each inmate's assigned guideline matched a crime other than their conviction, requiring substantially more time before qualifying for parole.[12] *Layne* construed the term *eligible for parole* in former R.C. § 2967.13(A).[13] With its syllabus in ital, *Layne* held:

> "We recognize that the APA has wide-ranging discretion in parole matters. [citations deleted] However, that discretion must yield when it runs afoul of statutorily based parole eligibility standards and judicially sanctioned plea agreements. *In any parole determination involving indeterminate sentencing, the Ohio Adult Parole Authority must assign an inmate the offense score that corresponds to the offense or offenses of conviction.*"[14]

[12] *See Layne*, 97 Ohio St. 3d 458-459 [Wiley Layne], 459-460 [Houston] and 461 [Lee].

[13] *See Layne*, 97 Ohio St. 3d 456, 463-464 (Ohio 2002).

[14] *Layne*, 97 Ohio St. 3d at 464.

Given *Layne's* holding, you would expect clauses authorizing upward departures to be deleted. Indicative of the autonomous and ungovernable nature of Ohio's Parole Board, the authority to make upward departures in offense categories remains fully intact.

Trial Court Eligibility Compared to Guideline Eligibility

Ohio's parole guidelines are pitched high. This condition is exacerbated by upward departures. To discover how high they are pitched and how they are further impacted by upward departures, a survey of 600 clients was conducted. This survey first noted the average time required by the court's minimum sentence. Next, this trial court sentence was compared to three benchmarks: (1) the average time required for entering the guideline *matching* the court conviction; (2) the average time required for entering an inmate's *assigned* guideline; and (3) the average time required for *receiving a meaningful hearing* within the assigned guideline. The results even surprised us.

> * In 534 out of 600 cases [89%], the minimum court sentence averaged 6.4 years. Entry into the matching guideline was 11.7 years. After serving 6.4 years for a judge, inmates had to serve *another* 5.3 years for an administrator before they *entered* the guideline matching their offense of conviction.[15]

[15] *See Michael v. Ghee*, Document No. 196, Charts and Graphs, Roman Numeral I.

* For the remaining 66 [out of 600] cases where sentences penetrated or equaled the matching guideline, upward departures occurred in all cases.[16]

* In 600 cases, the minimum sentence averaged 6.3 years. The average time required for entering the *Assigned Guideline*, a term reflecting both upward departures and matching guidelines, was 15.2 years.[17]

* In 526 out of 600 cases – 74 panels provided no answer, only "to be determined" – the minimum sentence averaged 6.1 years. The average time required for receiving a meaningful hearing was 18.5 years. This additional 12.4 years exceeds the minimum sentence by over 200%.[18]

Dotson was entitled to serious parole consideration in 1995. After serving 25 years in 2005, he *will not* receive serious consideration because he has not served the 32 years now required *by an administrator*. Without any show of good cause or any cause at all, inmates are continued because they are not serving time in their assigned guideline. Even in 2012, there is no guarantee that Mr. Dotson will receive serious parole consideration. In our survey of 600 clients, we found that two out of three inmates did not receive serious parole consideration until

[16] *See Michael v. Ghee*, Document No. 196, Charts and Graphs, Roman Numeral II.

[17] *See Michael v. Ghee*, Document No. 196, Charts and Graphs, Roman Numeral II.

[18] *See Michael v. Ghee*, Document No. 196, Charts and Graphs, Roman Numeral III.

they reached *the end* of their guideline.[19] In 2005, Mr. Dotson could easily be continued to 2015, which means that he will have to wait 20 years before receiving serious parole consideration. None of this time is assessed because of a finding that Mr. Dotson is not suitable for parole. *Parole Suitability is not even reached*. This time is dictated by a chart with drawn guidelines, whose precise boundaries lack any discernible basis or rationale beyond the obvious; these time-lines stretch prison sentences.

High pitched guideline ranges and upward departures structurally lock in vast amounts of time, overruling parole consideration on the trial court's terms. Attesting to Parole Board autonomy, the hearing ordered by a judge and made a part of the sentence has been degraded from meaningful release consideration to mere paper eligibility. The premise supporting these guidelines presupposes that the judge had no factual findings or legal reasons for granting an inmate parole after serving their minimum sentence. A new substantive formula for parole eligibility and suitability has been created. Guidelines and upward departures erect a *high hurdle* before discretion can be exercised.[20] The risk of an increased sentence is substantial. If § 1983 cannot be used to challenge this practice, administrators will continue exercising this *ultra vires* authority and do so with impunity.

[19] *See Michael v. Ghee*, Document No. 196, Charts and Graphs, Roman Numeral IV. [66% of inmates placed in high end of guideline.]

[20] *See Miller v. Florida*, 482 U.S. 423, 432 (1987).

ARGUMENT II – CHALLENGING SUITABILITY CRITERIA

Suitability criteria – whether a decision's factual basis is fitting and proper – is analogous to eligibility criteria. A claim alleging *ultra vires* acts by administrators coupled with a request to follow new procedures (i.e. a meaningful hearing) *in the future* should qualify under § 1983, because the habeas statute cannot be engaged.

Embracing and Generating Erroneous Records

At Johnson's review, the Parole Board Member based her decision on "the inclusion of offenses for which plaintiff had never been convicted"[21] or "even charged, in violation of the Code's permissible considerations,"[22] and "the inclusion of prison conduct reports which did not exist."[23] Both kinds of erroneous records are highly prejudicial to a parole candidate. Johnson was not allowed to speak or ask questions, although Ohio's Code requires parole panels to consider oral or written statements.[24] At this hearing, Johnson was continued ten years.

Reflective of autonomy, parole panels and prison record offices embrace and occasionally fabricate erroneous records. Irrefutable evidence must bow to internally generated documents. Certified court records were laboriously gathered to corroborate affidavits and prove this phenomenon. One panel transformed an arrest into a prior

[21] Appendix D, *Johnson v. Ghee*, at p. 53a.

[22] Appendix A, *Dotson v. Wilkinson*, at p. 6a.

[23] Appendix D, *Johnson v. Ghee*, at p. 53a.

[24] Appendix A, *Dotson v. Wilkinson*, at p. 6a.

– and bogus – felony conviction to ratchet upward the Risk Score.[25] Another panel transformed seven misdemeanors into two felonies for the same purpose.[26] Another panel embraced bogus juvenile convictions, ignoring a certified record proving these convictions did not exist.[27] Suitability criteria transforms into an indistinguishable blend of fiction and fact.

Rogerico Johnson has a common last name. Inmate files often contain records belonging to prisoners sharing the last name. Donald Hall had records reflecting one prior conviction and a prior arrest.[28] Municipal Court Judge Thomas Gysegem informed the Parole Board of two Donald Halls in Trumbull County. Judge Gysegem recites both social security numbers to prove that the Donald Hall with institution number A265679 was not convicted for a bad check or arrested for an assault charge in 1991.[29] Despite this evidence, these records remained in the inmate's file.

[25] *See Michael v. Ghee*, Document No. 205, Plaintiffs' Exhibit 99 A, Affidavit of Ricky Williams. [After creating a bogus felony conviction, the panel marked out a correct risk score and inserted an inflated score.]

[26] *See Michael v. Ghee*, Document No. 208, Plaintiffs' Exhibit 131, Affidavit of Shauntain White. [Three prior adult or juvenile felonies dictate an upward departure. Misdemeanors are not to be counted.]

[27] *See Michael v. Ghee*, Document No. 204, Plaintiffs' Exhibit 71, Affidavit of Damon Harp. [His Risk Score was raised because of juvenile offenses, of which he had none.]

[28] *See Michael v. Ghee*, Document No. 1, Original Complaint, at Paragraph 311.

[29] *See Michael v. Ghee*, Document No. 1, Plaintiff Exhibit 103 [Letter of Judge Gysegem, Sept. 20, 2000.]

Parole Board panels focus predominantly upon the crime and disciplinary record. Using crimes for which Johnson has never been charged and prison conduct reports which do not exist – at least as to him – strains credibility for justifying *ten days*, let alone *ten years*. It is patently arbitrary to rely upon records lacking any factual basis.

Johnson's Due Process Claim

In District Court, Johnson claimed his due process rights were violated because he did not receive a *meaningful* hearing. Like Dotson, Johnson is asking for a new procedure *in the future*. This form of relief cannot be granted under the restrictive habeas statute.

Securing a meaningful parole hearing with a result that is not arbitrary is no small matter to an Ohio inmate. The Parole Board has given itself the authority to issue a continuance for as long as ten years – one more indicia of autonomy – and this *follows* the time *already served* for the trial court.[30] While conducting our survey, we discovered that five to ten year continuances are not just common; they are often *necessary* to bridge differences between the trial court's minimum sentence and the assigned guideline range. Given the long span of time between parole reviews, there is a colorable claim qualifying a *meaningful hearing* as a protectible liberty interest under the Due Process Clause.

[30] *See* Department of Rehabilitation and Correction Policy No. 501-67 and Ohio Adult Parole Authority Extended Continuance Policy. These Policy Statements were never approved by Ohio's legislature.

ARGUMENT III – ABUSE OF THE TERMINATION REQUIREMENT

The second question asks whether ordering a new parole review necessarily invalidates the prior hearing. If ratified, the *favorable termination requirement* would further buttress Parole Board autonomy. No inmate challenge could evade this net, for every review engages and threatens a prior finding. This precedent would transform *Heck* into a Halt sign, disqualifying any inmate challenge from § 1983 consideration.

Parole Decisions do not Equate to Judicial Decisions

At first reviews, nine out of ten Ohio hearings are clerical exercises. Inmates receive two scores; (1) convictions *should* dictate the offense score, and (2) their prior criminal history tabulates a risk score. These scores consign an inmate to a guideline. If the candidate has not penetrated the range required for their crime, the guideline placement requires a perfunctory continuance. In Dotson's case, his *second* hearing will be a perfunctory denial. *Discretion is never exercised*. Parole decisions are not equivalent to judicial decrees.

As employed by Ohio's Attorney General, the *favorable termination requirement* of *Heck* has been transformed into a robotic claim dismissal machine, capable of labeling all parole related claims legally frivolous at the starting gate, notwithstanding evidence suggesting meritorious issues. Dotson's and Johnson's claims attest to this phenomenon.[31] The simplicity of this clause is also its curse. In

[31] *Wilkinson v. Dotson*, Appendix C at p. 50a and 51a, Appendix D at p. 55a and 56a.

a parole context, *Heck's* standard is impossible to satisfy. The *favorable termination requirement* could effectively entrench Parole Board autonomy, nourishing audacity and further exacerbating ungovernability.

ARGUMENT IV – PAROLE IS NOT *PRISON ADMINISTRATION*

Parole officials possess remedial sentencing authority. Judges possess punitive sentencing authority. In Ohio, where the statutory scheme for a first degree crime is 5 to 25 years, this boundary has been crossed. When parole officials exceed their authority, the intrusion vitiates trial court orders. *Layne* has been emasculated and trivialized by Ohio's Parole Board bureaucracy to the point of rendering it ineffectual. Conduct contemptuous of judicial authority must not be condoned because prison officials have labeled the challenged activity *prison administration*.

Wiggling around *Layne's* Command

Michael v. Ghee has tracked Ohio's Parole Board for three years. The creature in the cross hairs of our scope has impressed us. A more insular and intractable foe cannot be fathomed. Petitioners' statement that myriad § 1983 claims were ultimately resolved on state law grounds by Ohio's Supreme Court is not true.[32] We take pleasure in describing how far wide of the mark this statement falls. Imagine the Parole Board circling *Layne*

[32] Brief for Petitioners, at p. 47.

under our microscope glass. For the squeamish, beware. This dissection is not pretty.

Layne's holding and its use of the words *must assign* produces a straightforward, unambiguous order. The message registered. In an affidavit, the Parole Board stated:

> "The OPB stopped the practice of classifying offenders' offense behavior under the Parole Guidelines based on anything other than their offenses of conviction at approximately noon on December 18, 2002. It has not resumed that practice and has no plans to do so. The offense behaviors of all inmates evaluated under the Parole Guidelines since December 18, 2002 has corresponded to the offense or offenses of conviction, regardless of whether they are incarcerated pursuant to a plea agreement or a trial. That will also be true of all inmates classified under the Parole guidelines in the future.
>
> "The OPB will rehear all inmates whose offense behavior was previously classified under the Parole Guidelines as something other than their offenses of conviction. Those rehearings will occur regardless of whether the inmate is incarcerated pursuant to plea bargains or trials and will result in those inmates' offense behavior being classified based on their offenses of conviction."[33]

On the strength of this affidavit, several *Michael v. Ghee* claims were declared moot.

[33] *See Michael v. Ghee*, Document No. 135, Defendants' Motion to Dismiss for Mootness, Exhibit A, 3rd Affidavit of Richard Spence. [Mr. Spence is Chief of Quality Assurance for the Ohio Parole Board.]

Paring 3,218 Inmates from *Layne* Reviews in 34 Days

As a rule, Parole Board's are secretive government agencies. Ohio is no exception. In a sharp departure from customary practice, the website of a newspaper was enlisted for publishing the names of inmates qualifying for a *Layne* review. This occurred on April 27, 2003. 5,316 inmates were listed.[34] Inexplicably, the newspaper's website carried a second list of qualifying inmates on May 31, 2003 numbering 2,098.[35] In an accompanying article, no explanation was given for paring down the number of qualifying inmates from 5,316 to 2,098 in just 34 days. Between April 27th and May 31st, wiggle room was discovered.

Douglas Ankrom qualified for a *Layne* review on the 1st and 2nd list.[36] He was convicted of first degree murder. Category 11 matches his conviction. Question 1 of the Parole Board Decision form records the offense behavior score.[37] Instead of Category 11, Category 13 appears, referring to aggravated murder. Ankrom's trial court

[34] *See Michael v. Ghee,* Document No. 197, Plaintiffs' First Ohio Adult Parole Authority Layne Review List, published on the Cleveland Plain Dealer website 4/27/2003.

[35] *See Michael v. Ghee,* Document No. 198, Plaintiffs' Second Ohio Adult Parole Authority Layne Review List, published on Cleveland Plain Dealer website 5/31/2003.

[36] *See Michael v. Ghee,* Document No. 199, Plaintiffs' Exhibit 1-A, Affidavit of Douglas Ankrom, corroborated by a certified copy of judgment entry, his Parole Board decision prior to *Layne* where he was placed in Category 13 for Aggravated Murder, and his post-*Layne* decision dated May 16, 2003.

[37] *See* Amici Brief for Respondents, Appendix I, at p. 1 – Question 1.

judgment is never acknowledged. Reflective of autonomy and ungovernability, this occurred in 2,098 cases.

Moses Clark appears on the first *Layne* list.[38] His name is missing from the 2nd *Layne* list. Mr. Clark's conviction engages category 10. The Parole Board agrees.[39] A score of 10 appears in Question 1. Question 8 on the parole decision form prior to *Layne* provided space for an upward departure.[40] For Question 8, his panel determined that he is a "more serious risk than indicated by his criminal history risk score." Instead of getting a higher *risk score*, Clark's panel made a one range *offense departure*. Engaging category 11 conflicts with his conviction and adds five years – as compared to 2½ years for a risk score departure – before qualifying for parole. In defending this decision, the Parole Board stated:

> "Our office has reviewed your file per the above noted request and determined that the ruling (i.e. *Layne*) does not apply to your case. The Parole Board did assign the offense category that corresponds with your offense(s) of conviction. Therefore, the continuance rendered to you by

[38] *See Michael v. Ghee,* Document No. 208, Plaintiffs' Exhibit 130, Affidavit of Moses Clark [corroborated by certified court judgment, his 2001 parole decision and two letters seeking a *Layne* review. Mr. Clark appears on page 15 of the first alphabetical *Layne* List. His risk score is 1. A departure would move him horizontally one range.]

[39] *See* Letter from E.M. Colan, corroborating facts in Mr. Moses affidavit.

[40] *See* Amici Brief for Respondents, Appendix I, at Question 8.

the Parole Board stands and no further action will be taken at this time."[41]

We have 28 identical letters.[42] One factor separates 2,098 inmates on the 2nd *Layne* list from 3,218 inmates omitted. This common denominator is *the location of an upward departure*. If the departure appears in Question 1, a review is needed *to add the score matching the conviction*. If this departure occurs on Question 8, Question 1 reflects the trial court score. No review is needed. Like Clark, 3,218 inmates are serving time *required* by an offense score higher than their crime. The Parole Board considers this detail immaterial.

Layne Frustrated and Circumvented

Via this bureaucratically inspired revelation, *Layne* has been reduced to a clerical entry. Ohio's Supreme Court has no interest in a hearing's result. *Layne* is only concerned with *the appearance of the record*. Question 1 needs a certain number, just as Question 4 needs a number tallying the months served. No further significance attaches to either entry.

[41] *See Michael v. Ghee*, Document No. 208, Plaintiffs' Exhibit 130, Affidavit of Moses Clark, letter from Case Analyst Eric Griffith, dated July 28, 2003.

[42] *See Michael v. Ghee*, Document No. 210, Plaintiffs' Exhibit 148, 22 Form letters from Parole Board Chairman Gary Croft and 6 Form letters from Parole Board Case Analyst Eric Griffith.

Layne's last sentence[43] has been separated from its context[44] and given a literal interpretation. In lieu of upward departures, months are added for *aggravating factors*.[45] By adding time for reasons purportedly grounded in *Layne*, the Parole Board circuitously acquires a license to do precisely what *Layne* prohibited. For second and later reviews post-*Layne*, the matrix grid has been disemboweled because guideline boundaries no longer function as benchmarks for time-served. Charging, convicting and sentencing an inmate for new criminal behavior, the practice outlawed by *Layne*, continues under a new form of *ultra vires* authority – simulating the sentencing hearing conducted by a Judge. Administrators are adding years for *aggravating factors* or *any other factors the APA deems relevant* for behavior springing from the original crime and already considered by the trial court. In the process, the settled expectation of an inmate that they have been fully punished for their crime is totally undermined. The measure of determination displayed by parole officials to preserve discretion, even at the cost of outrageously assaulting and usurping judicial authority, is shocking and dangerous. More potent evidence of Parole Board autonomy and ungovernability would be hard to find.

[43] 97 Ohio St. 3d at 464. "We further emphasize . . . that the APA, when considering an inmate for parole, still retains its discretion to consider any circumstances relating to the offense or offenses of conviction, including crimes that did not result in conviction, as well as any other factors the APA deems relevant."

[44] Two authorities follow, *Hemphill v. Ohio Adult Parole Authority*, 61 Ohio St. 3d 385, 386 (Ohio 1991) and Administrative Rule 5120:1-1-07. These authorities allow consideration of acquitted conduct along with other factors in determining *where* an inmate is to be placed *within* their proper guideline range.

[45] *See* Amici Brief for Respondents, Appendix II, at p. 2, Questions 8 and 9. *Compare* to Questions 8 and 9 in Amici Brief for Respondents, Appendix I.

ARGUMENT V –
DUE PROCESS AND MEANINGFUL HEARING

Dotson's case illustrates how Ohio's Parole Board plunged headlong into the sentencing business. Johnson's case documents how parole panels make a mockery out of a single court judgment. Taken together, we have a composite portrait of how parole administrators usurp authority from judges. Undisputed facts are sufficiently atrocious to warrant a finding not contemplated when certiorari was granted. The procedural safeguards in *Wolff*[46] need to be extended to parole hearings. These protections, specifically the maintenance of a record at the hearing and producing a written and reasoned decision grounded in evidence developed from the hearing, will hold parole decision-makers accountable and render their decisions suitable for judicial review. Most importantly, the primacy of judicial authority will be restored. While parole is not a protected liberty interest, a *meaningful hearing* needs to become a protected liberty interest because parole panels are administering punitive and illegal modifications to a trial court's lawful sentence in an *ultra vires* manner.

Parole Guidelines Never Approved by Legislature

In 1961, certiorari was granted to review an Ohio statute making the mere possession or control of obscene material a felony.[47] When facts were fully revealed, the

[46] 418 U.S. 539, at 563-570 (1974).

[47] *Mapp v. Ohio*, 367 U.S. 643, at 673 (1961) [Dissent of Justice Harlan].

seizure of this material turned out to be so appalling,[48] this Court abandoned the certified question and produced its landmark decision *Mapp v. Ohio*.[49] We are not suggesting abandonment of the certified question. We are asking this Court to address the *ultra vires* acts of parole administrators and check the resulting usurpation of judicial authority.

Ohio's parole guidelines were never approved by the legislature and do not appear in Ohio's administrative code.[50] Mr. Wilkinson, as Director of an Ohio Department, used a general grant of delegated authority to implement these rules. In so doing, the penological philosophy sanctioning Ohio's indefinite sentencing scheme has been totally sabotaged.

There is nothing in Ohio's Revised Code favoring the maximum sentence over the minimum sentence. The minimum sentence rendered by a judge stands equivalent to the maximum sentence issued by operation of law. Both sentences should maintain their respective magnetic properties. The minimum sentence is there to reward offenders desiring to conform. The maximum sentence is there for inmates unwilling to address antisocial behavior. This equilibrium has been destroyed by these new parole guidelines. Once the hollow bureaucratic exercise masquerading as the first parole review is done, the trial court

[48] *Mapp v. Ohio*, 367 U.S. at 644.

[49] 367 U.S. 643 (1961).

[50] *See* Ohio R.C. § 111.15(D)(1) and (4) [provision for review and approval by the General Assembly's Joint Committee on Agency Rule Review for new executive rules]. *See also* Ohio R.C. § 119.03(H)(1), (2)(a), (b) [prerequisites not met for inclusion in Ohio's Administrative Code.]

minimum sentence is rendered a nullity. Even first time offenders and model inmates must step off time to their maximum sentence with no relief in sight.

The Thorough Pre-Hearing Review

Petitioners describe parole officials as conducting a thorough pre-hearing review of the inmate's prison and parole file.[51] We disagree. An inmate's Master File (i.e. court file) and Unit File (i.e. institution file) can be up to eight inches thick. These files must never leave the prison. The pre-hearing review begins when the Central Office generates a list of parole candidates called Panel Assignments.[52] 20 to 30 inmates are typically listed on a panel.[53] One Parole Board Member and one Hearing Officer are assigned to a panel *on the day of the hearing*. The first time all of the files and all of the decision-makers converge is on the day of the hearing.[54] Before this time, neither a

[51] Brief for Petititoners, at p. 7.

[52] *See Michael v. Ghee,* Document No. 63, Plaintiffs' Ohio State Highway Patrol Investigation of Parole Board Hearing Officer Harold Miller, Testimony of Thomas C. Schneider, Executive Assistant to the Chairperson on April 6, 1998 at p. 3. [Mr. Schneider generated the initial panel assignments.]

[53] *See Michael v. Ghee,* Document No. 62, Volume I, Plaintiff Exhibit 8, Memos from Liann Bower, Record Supervisor at Northeast Pre-Release Center in Cleveland to Unit Managers, regarding Parole Board Hearings August 2 & 3, 2001, dated July 25, 2001 and September 5 & 6, dated August 3, 2001.

[54] *See Michael v. Ghee,* Document No. 63, Testimony of Executive Assistant Thomas C. Schneider on April 6, 1998 at p. 32. ["When they go to the institution that day, that's you know, the call sheet . . . that's when they'll find out where they're going, who they're working with and what inmates they're going to hear. It's not that they couldn't pull up a call sheet or have a call sheet pulled up ahead of time to see who's on a certain panel, they could do that, but in my mind there'd be no reason

(Continued on following page)

Parole Board Member nor a Hearing Officer knows for sure which cases they will be hearing that day.[55]

Decisions will be rendered on every candidate *that day*. If there are twenty-six inmates on a panel, the stack is divided evenly between the Hearing Officer and Parole Board Member. Each decision-maker taking a file becomes the *primary* for that case.[56] Only the *primary* decision-maker becomes acquainted with each file.[57] The *primary* decision-maker conducts their hearing while the other decision-maker prepares for the next case.[58] Two decision-makers initial each decision.[59] If cases are continued, the

for them too. Because who cares who you see. You know what I mean, who's on your panel is who you see, you got to get the job done."]

[55] *See Michael v. Ghee,* Document No. 63, Testimony of Parole Board Member Constance Upper on April 7, 1998 at p. 2-3. *See also* Testimony of Hearing Officer Ronald Stevenson on April 22, 1998 at p. 3; Testimony of Hearing Officer Michael Keith on April 7, 1998 at p. 3; Testimony of Hearing Officer Kathy Hilbert on April 22, 1998 at p. 5.

[56] *See Michael v. Ghee,* Document No. 63, Testimony of Hearing Officer Kathy Hilbert, April 22, 1998 at p. 10. *See also* Document No. 63, Testimony of Hearing Officer Ronald Stevenson, April 22, 1998 at p. 21.

[57] *See Michael v. Ghee,* Document No. 63, Testimony of Parole Board Member Constance Upper, April 7, 1998, at p. 7; Document No. 63, Testimony of Hearing Officer Ronald Stevenson, April 22, 1998, at p. 25.

[58] *See Michael v. Ghee,* Document No. 63, Testimony of Executive Assistant Thomas C. Schneider on April 6, 1998, pp. 4, 9. *See also* Document No. 199, Plaintiffs' Exhibit 4-B, Affidavit of Brad Lee Baeder [One panel member conducts the hearing. The other person looks at unrelated records].

[59] *See Michael v. Ghee,* Document No. 63, Testimony of Hearing Officer Ronald Stevenson, April 22, 1998 at p. 20; *See also* Document No. 63, Testimony of Parole Board Member Constance Uppers on April 7, 1998 on p. 7. [The non-primary decision-maker gives the file only a cursory review, if that.]

non-primary decision-maker initials in rapid succession.[60] The size of these files and the lack of opportunity to review files till the day of the hearing, coupled with pressure to generate twenty to thirty decisions in a day, has a predictable and demeaning consequence.[61] The decision form[62] and information to be verified in a computer[63] become more important than the candidate. This helter-skelter process victimizes more than just inmates. Trial court decisions and criminal justice are also mortally wounded.

Wrecking Carnage upon Ohio Judicial Decisions

Inmate cases in *Layne* document destruction to court judgments. Wiley Layne was convicted of abduction. For this crime and his criminal history, a guideline of 5 to 7 years applied. The Parole Board found him guilty of kidnapping and applied a guideline of 12.5 to 17.5 years.[64]

[60] *See Michael v. Ghee*, Document No. 63, Testimony of Parole Board Member Larry Matthews on April 6, 1998, p. 9. *See also* Document No. 63, Testimony of Parole Board Member Constance Upper on April 7, 1998, p. 7; Document No. 63, Testimony of Hearing Officer Ronald Stevenson on April 22, 1998, p. 6, 7.

[61] *See Michael v. Ghee*, Document No. 62, Volume I, Plaintiff Exhibit 11, Affidavit of Douglas Lawson [his hearing lasted five to eight minutes and the hearing officer was rushed, hurried and rude.] *See also Michael v. Ghee*, Document No. 204, Plaintiff Exhibit 72, Affidavit of Sheila Rutkowski [Parole Board Member Denton told her she had 10 minutes so she had better hurry up.]

[62] *See Michael v. Ghee*, Document No. 199, Plaintiffs' Exhibit A-2, Affidavit of Doug Ankrom [decision written before he entered the room].

[63] *See Michael v. Ghee*, Document No. 199, Plaintiffs' Exhibit 12-A. Affidavit of Robert Budd [Hearing's purpose was to verify data in the computer. Unit and Master Files were available but never consulted.]

[64] *See Layne*, 97 Ohio St. 3d at 458-459. [Mr. Layne's complaint was dismissed as legally frivolous.]

Gerald Houston pled guilty to one count of aggravated burglary, three counts of aggravated robbery and two counts of attempted murder. Mr. Houston's crimes required 10 to 15 years.[65] The Parole Board gave him a two range upward departure, finding him guilty of attempted rape. Houston was never charged with attempted rape.[66] His departure required 20 to 25 years. Howard Lee was convicted of involuntary manslaughter.[67] He received 3 years for a firearm violation and 9 to 25 years for his crime. His parole panel found him guilty of aggravated murder and placed him in Category 13,[68] a guideline requiring at least 30 years. Lee would never become eligible for parole. His maximum sentence expired two years before his guideline began.

In fifteen file cabinets of client documentation, we can produce thousands of similar horror stories. Reigning-in parole decision-makers has just become even more pressing, given the current reading of the Sixth Amendment announced in *Blakely v. Washington*.[69]

Exclusion of Ohio's Judiciary from Parole Decisions

From a Separation of Powers perspective, Federal and Ohio parole guidelines are polar distances apart. At a federal sentencing hearing, the trial judge presides and

[65] *See Layne*, 97 Ohio St. 3d at 460.

[66] *See Layne*, 97 Ohio St. 3d at 460. [Mr. Houston's complaint was dismissed as legally frivolous.]

[67] *See Layne*, 97 Ohio St. 3d at 461. [Only Lee's complaint survived a Motion to Dismiss.]

[68] *See Layne*, 97 Ohio St. 3d at 461.

[69] 72 U.S.L.W. 4546 (2004).

applies guidelines *before* the Defendant begins their sentence. Guidelines are applied consistent with the conviction. A court reporter is present to generate a transcript. If a federal inmate is unhappy with a sentencing decision, they can appeal to a Federal appellate court.

In Ohio, guidelines are applied after the minimum sentence, minus good time, has been served. The hearing is conducted in prison by an administrator.[70] There is no hearing transcript.[71] Only the inmate and decision-makers may be present.[72] Parole panels have authority to depart from court judgments, acting as prosecutor, judge and jury. At a hearing's conclusion, an inmate can be found guilty of a crime never sanctioned by a judge or proven in court. For second and later parole reviews, years can be added for aggravating factors previously considered at a sentencing hearing and factored into the minimum sentence. Ohio inmates have no appellate rights regarding how guidelines have been applied. Inmates can only appeal to a Quality Assurance Group composed of the same administrators making these decisions initially.[73]

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[70] *See* Brief for Petitioners, Supplement at S-10, ODRC Policy 501-36, Parole Board Hearing Policy, IV Definitions, Paragraph J. [omitted from excerpt provided by Petitioner].

[71] *See* Brief for Petitioners, Supplement at S-12, ODRC Policy 501-36, Parole Board Hearing Policy, VI Procedure, Paragraph C(2) and S-14, Paragraph C(8).

[72] *See* Brief for Petitioners, Supplement at S-12, ODRC Policy 501-36, titled Parole Board Hearing Policy, VI Procedure, Paragraph C(2).

[73] *See* Brief for Petitioners, Supplement at S-17, ODRC Policy 501-38. Petitioners' statement that inmates have two court avenues for contesting parole decisions is not accurate. (Brief for Petitioner at pp. 10-11). Policy No. 501-38 provides an inmate with no court avenues. The options mentioned, Declaratory Judgment and Mandamus, are

(Continued on following page)

Parole Hearing a Protected Liberty Interest

The total collapse of *due process* at Johnson's hearing, compounded by a ten year continuance, casts an ominous shadow over this record just as the seizure of evidence haunted *Mapp*. Johnson raised this issue at his trial court. This Court has authority to consider such questions *de novo*. Ohio's Supreme Court has construed the term *eligible for parole* in former R.C. § 2967.13(A) as requiring a meaningful parole hearing.[74] In a state trial court decision consolidating 24 cases and certified as a class action, a Common Pleas Judge in Franklin County (i.e. Columbus) just held that Ohio inmates are entitled by contract *and by statute* to meaningful parole consideration.[75] There is no legal or constitutional authority giving administrators the right to overrule judges.

Confidence in criminal jurisprudence has been imperiled by *ultra vires* acts of parole administrators. We understand that Ohio inmates have no vested right to parole.[76] However, since *Sandin v. Conner*[77] overruled much of the reasoning in *Hewitt v. Helms*,[78] and *mandatory language* in a statute or rule has been replaced by a new standard

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both illusory. Lack of a record from a parole hearing renders the Declaratory Judgment route hollow. Parole Board discretion totally nullifies the Mandamus cause of action.

[74] *See Layne*, 97 Ohio St. 3d 456, 463-464 (Ohio 2002). "Inherent in the statutory language is the expectation that a criminal offender will receive meaningful consideration for parole."

[75] *See Ankrom v. Harry Hageman*, Case #01CVH02-1563, slip opinion at p.13 attached hereto as Appendix III.

[76] *See Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979).

[77] 515 U.S. 472 (1995).

[78] 459 U.S. 460 (1983).

inquiring as to whether restraints upon freedom impose *an atypical and significant hardship*, an opening has been created for considering a second issue related to parole within the context of the Due Process Clause. Given the prosecutorial bend of Ohio's Parole Board and their authority and proclivity to depart from trial court judgments, we believe inmates deserve and need a protected liberty interest in a *meaningful parole hearing*, if judicial primacy is to be maintained.

CONCLUSION

For the foregoing reasons, as well as arguments in Respondents respective merit briefs, the Sixth Circuit's decision should be affirmed.

Respectfully submitted,

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Ohio Parole Board Decision

Name:	Inmate No.:	Date:
Hearing Type:	Security Level:	Sentence:	(MAX/EDS/EST. (circle one)

1. The (offense) (parole violation) behavior has been rated as Category _____ because the offense behavior involved (Circle appropriate behavior):

_____

_____

_____

_____

_____

_____

Section No.(s):

_____

2. The Criminal History/Risk Score is _____ .
3. The Guideline Range is _____ months.
4. Time served _____ mos + JTC _____ mos = Total Time Served _____ mos. TPV Arrest Date: _____
5. Check if non -applicable ☐ . The inmate has committed new felony criminal conduct in a prison facility that is rated as Category _____ because it involved: _____

_____

_____

Section No.(s):

_____

The Rescission Criminal History/Risk Score is _____ .

This conduct requires _____ months to be added to the guideline range.

6. Check if non-applicable ☐
   A. The inmate has committed _____ disciplinary infractions involving non-felonious threatening conduct against staff and/or non-felonious possession of a dangerous instrument (6-12 months per infraction to be added to the guideline range) that occurred on the following dates:

   _____

   B. The inmate has committed _____ disciplinary infractions involving possession or use of alcohol and/or possession or use of a controlled substance other than possession of a controlled substance with intent to distribute (3-6 months per infraction to be added to the guideline range) that occurred on the following dates:

   _____

   C. The inmate has committed _____ disciplinary infraction involving other misdemeanor conduct (0-6 months per infraction to be added to the guideline range) that occurred on the following dates:

   _____

   D. The inmate has committed _____ other significant disciplinary infractions (0-2 months per infraction to be added to the guideline range) that occurred on the following dates:

   _____

   This conduct requires _____ months to be added to the guideline range.

DEFENDANT'S EXHIBIT
P.1
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Name:	Inmate No.:	Date:

7. Check if non -applicable ☐ . The aggregate guideline range is _____ months.

8. After review of all relevant factors and information presented:

☐ A. A decision outside the guidelines at this consideration is not warranted. Therefore, the Board's decision is within the applicable guideline range.

☐ B. Rescission guidelines were used to address rescission behavior since the last time setting hearing, and the aggregate guideline range is exceeded.

☐ C. A decision (Above/Higher) (Below/Lower) the guidelines is warranted because:
- ☐ (1) The inmate's offense behavior involved the following specific (aggravating) (mitigating) factors:
- ☐ (2) The inmate is a (poorer) (more serious) (better) risk than indicated by his/her criminal history score for the following specific reasons:
- ☐ (3) Other specific reasons:

List number of guideline ranges departed: Vertical _____ Horizontal _____

List selected guideline range: _____ months.

2a

_____

_____

_____

_____

_____

_____

_____

_____

_____

9. Total time to be served _____ months.

10. Optional Outstanding Program Achievement ☐ granted ☐ not granted.
(Note: The granting or denying of such credit is discretionary.)

The Board's decision includes a _____ month credit for outstanding program achievement as specified below:

_____

_____

11. Adjusted total time to be served _____ months.

12. Recommendation: _____

_____

13. Institutional conditions prior to PRD or next hearing: _____

_____

DEFENDANT'S EXHIBIT
10 P-2
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14. Hearing Panel:

Board Member:	Hearing Officer:

Release on PRD is contingent on good institution behavior and/or reduction from maximum security status.
A PRD may be extended for a Class II violation when the case is reviewed at the PRD Pre-Release Review.

DRC 3331 (7/99) DISTRIBUTION: WHITE - Parole Board CANARY - Inmate PINK - Research GOLDENROD - Record Office

Criminal History / Risk Score

Inmate Name:	Institution#:
Date of Birth:	

Select the appropriate answer to each item and enter the associated weight in the corresponding box

Risk Item	Weight	Score
Item A. Prior Convictions/Adjudications (Adult or Juvenile)		
NONE	0	
1 - 2	1	
3 OR MORE	2	
Item B. Prior Commitments of More Than One Year (Adult or Juvenile)		
NONE	0	
1	1	
2	2	
3 OR MORE	3	
Item C. Recent Commitment Free Period (Three Years)		
No prior commitment of 60 days or more (adult or juvenile) or released to the community from last such commitment at least 3 year prior to the commencement of the current offense	0	
Released to the community from a commitment of 60 days or more (adult or juvenile) Less than 3 years prior to the commencement of the current offense	1	
Item D. Probation/Parole/Confinement/Escape status violator this time		
Neither on probation, parole, confinement, or escape status at the time of the current offense; nor committed as a probation, parole, confinement, or escape status violator this time	0	
On probation, parole, confinement, or escape status at the time of the current offense; Or committed as a probation, parole, confinement, or escape status violator this time	1	
Item E. Prior Probation/Parole Revocations		
No prior probation or parole revocation	0	
One or more prior probation or parole revocations	1	
Item F. Older Offenders		
If age 40 or older at the commencement of the current offense (and the total score from Items A-E above is 1 or more) Subtract	1	
Otherwise	0	
TOTAL SCORE		

Completed By (Signature):	Date:

DRC 3153 (Rev. 2/99) DISTRIBUTION: WHITE - Board File CANARY - Inmate PINK - **RESEARCH**

DNCAD-Bayonne, N. J.

DEFENDANT'S EXHIBIT 8

Ohio Parole Board Decision Sheet

Inmate Last Name:	Inmate First Name:	# Prefix:	Inmate Number:

Current Hearing Identifier:

Hearing Month (mm/yyyy):	Type of Hearing:	Record Number:	Date of Hearing:

Offense(s) of Conviction:

---

1. **Category** __ for the conviction
   A. Guideline Section No.(s):
   B. Details of the conviction behavior. Only state the facts that support the specific offense category, which corresponds to the offense(s) of conviction:

---

2. **Criminal History/Risk Score:** 3. **The guideline range is** ____ months.

---

4. **Total Time Served:**
   TPV Arrest Date:

---

5. ____ infractions that resulted in a new conviction for felony criminal conduct committed in a prison facility/or while in custody. Only state the facts that support the specific offense category, which corresponds to the offense(s) of conviction.

Category for New Conviction:	Section No.(s):	Criminal History/Risk Score:	Guideline Range:

Details of Conviction Behavior:

---

6. **Class II Rescission Behavior Guideline Range is** ____ months.

A. __ disciplinary infractions involving felonious conduct

1. 6-18 months for each infraction	2. = months

Details:

B. __ disciplinary infractions involving threatening conduct against · taff and/or possession of a dangerous instrument

1. 6-12 months for each infraction	2. = months

Details:

C. __ disciplinary infractions involving possession or use of alcohol and/or a controlled substance other than possession with intent to distribute

1. 3-6 months for each infraction	2. = months

Details:

Inmate Last Name:	Inmate First Name:	# Prefix:	Inmate Number:	Institution:

D. __ disciplinary infractions involving other misdemeanor conduct

1. 0-6 months for each infraction	2. = months

Details:

E. __ significant disciplinary infractions

1. 0-2 months for each infraction	2. = months

Details:

7. **Aggregate Guideline Range is:** ____ months (#3 + #5 + #6)

8. **Rationale of decision within Aggregate Guideline Range:**

9. A. **Circumstances related to the offense(s) of conviction, including crimes that did not result in conviction, and any other factors the APA deems relevant:**

B. **Based on these additional factors, an additional ___ months should be served from the date of this hearing before release/next hearing.**

10. A. **Total Time to be Served:** To next hearing ☐ ___ months
To Release ☐ ___ months

B. **Remaining Time to be Served:** To next hearing ☐ ___ months
To Release ☐ ___ months

11. A. **Outstanding Program Achievement** ☐ granted ☐ not granted
B. __ month credit for the following programs:
C. Adjusted Total Time to be Served: months
D. Adjusted Remaining Time to be Served: months

12. **Recommendation:**

13. **Instructions/Notes:**

14. **Hearing Panel**

Board Member Signature:	Hearing Officer Signature (if applicable):
Board Member:	Hearing Officer (if applicable):

Release on PRD is contingent on good institution behavior and/or reduction from maximum security status. A PRD may be extended for a Class II violation when the case is reviewed at the PRD Pre-Release Review.

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

Douglas Ankrom, et al.,	(Filed 2004 August 31)
Plaintiff,	Case No. 01CVH02-1563
vs.	Judge Cain
Harry Hageman, et al.,	
Defendants	
Don Carlos Scott,	
Plaintiff,	
vs.	Case No. 00CVH04-315
The Ohio State Adult Parole Authority,	Judge Brunner
Defendant.	
Rufus N. Watkins,	
Plaintiff,	
vs.	Case No. 00CVH06-5425
The Ohio State Adult Parole Authority,	Judge Hogan
Defendant.	
Terrance Davis,	
Plaintiff,	
vs.	Case No. 00CVH07-6781
The Ohio State Adult Parole Authority,	Judge Miller
Defendant.	

Michael C. Poluka, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 00CVH08-7676 Judge Miller
John R. Adams, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 00CVH12-10731 Judge Connor
Yohance A. Edmonds, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 01CVH01-148 Judge Connor
Gerald L. Raines, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 01CVH01-835 Judge Brunner

Matthew Biddle, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 01CVH03-2206 Judge Cain
Tysen Porter, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 01CVH05-4246 Judge Brunner
Donald A. Harman, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 01CVH05-4713 Judge Brunner
David A. Cunningham, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 01CVH06-5338 Judge Brunner

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

Douglas Ankrom, et al., Plaintiff, vs. Harry Hageman, et al., Defendants	:	Case No. 01CVH02-1563 Judge Cain
Don Carlos Scott, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 00CVH04-315 Judge Brunner
Rufus N. Watkins, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 00CVH06-5425 Judge Hogan
Terrance Davis, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 00CVH07-6781 Judge Miller

DECISION AND ENTRY

This matter came before the court on motions for summary judgment filed by both the plaintiffs and the defendants. Both sides have filed memoranda contra and replies to the memoranda contra.

Extensive negotiations have been conducted by the parties and the defendants have held re-hearings for the more than 2,400 class members in this case after the Ohio Supreme Court released its opinion in *Layne v. Ohio Adult Parole Authority*, 97 Ohio St. 3d 456. However, the parties have not been able to resolve all the issues in the instant litigation and it is now ripe for a decision on the motions.

The factual background is not in dispute. The plaintiffs in this class action are inmates in the custody of the Ohio Department of Rehabilitation and Corrections (ODRC) serving indeterminate sentences under the "old law", i.e. the criminal sentencing laws that were in effect before S.B. 2 became effective on July 1, 1996, and eliminated indeterminate sentences for all but the most serious offenses. The Ohio General Assembly refused to make the new laws retroactive – apparently for no reason other than political expediency – and thereby created two classes of inmates serving different amounts of time for the same offenses. The "new" criminals serve exact sentences as imposed by the sentencing judges. But the release dates for the "old" criminals are still determined by the Ohio Adult Parole Authority (OAPA).

Most of the class members in this litigation were complaining that they were convicted of or entered a guilty plea or no contest plea to lesser and fewer crimes

than indicted but were assigned offense categories by the OAPA that did not correspond to their offenses of conviction. During the pendency of this action, the Ohio Supreme Court issued a decision (in December, 2002) in *Layne v. Ohio Adult Parole Authority*, 97 Ohio St. 3d 456, and held that "in any parole determination involving indeterminate sentencing, the OAPA must assign an inmate the offense category score that corresponds to the offense or offenses of conviction."

Since that time, the OAPA has conducted new parole hearings for about 2500 inmates who came within the *Layne* purview and more than half of them have now been released.

Thus, the claims of numerous class members are now moot. However, other claims remain and should be resolved in accordance with the language the Supreme Court employed in *Layne*. The complaints revolve around the Ohio Parole Board Guidelines that the OAPA issued on March 1, 1998.

The plaintiffs complain that by issuing the new guidelines the OAPA engaged in rulemaking but did not promulgate the new rules in accordance with the Administrative Procedure Act. They also argue that the OAPA's guidelines and practices violate the doctrine of separation of powers, violate the contracts they entered as a result of plea negotiation, violate constitutional guarantees of due process and equal protection, and violate constitutional prohibitions against double jeopardy and ex post facto enhancement of punishment.

As to the rulemaking challenges, the defense points out that the Tenth District Court of Appeals (Franklin County) held in *Poluka v. Adult Parole Authority*, 2003

Ohio 153, that parole guidelines are not administrative rules and need not be promulgated in accordance with the Administrative Procedures Act (APA). The plaintiffs argue that the *Poluka* case should not be followed because it relied on *Mayrides v. Ohio Adult Parole Authority*, 1998 Ohio App. LEXIS 1865. *Mayrides* involved a one-page matrix formerly used by the OAPA as opposed to the 93-pages of detailed guidelines that are involved in the current dispute. However, a reading of those cases shows that they did not turn on the length or complexity of the guidelines but simply on the principle, as stated in *Mayrides*, that "guidelines are not rules binding on the parole board." And *Poluka* did, indeed, involve the same 98-page guidelines at issue here. The review court said "there was no legal basis for the trial court to declare the parole guidelines void."

As the court pointed out in both cases, the parole board retains discretion on a case-by-case basis as to whether to use the guidelines.

Therefore, the guidelines cannot be invalidated due to failure to follow the APA in their adoption. However, with or without guidelines, the parole board's discretion still is not without limits. The Supreme Court in *Layne* said "discretion must yield when it runs afoul of statutory based parole eligibility standards and judicially sanctioned plea agreements."

The court in *Layne* said it is not enough for the board to declare an inmate eligible for parole and to grant a hearing. At page 27, the court said " . . . the words 'eligible for parole' in former R.C. 2967.13(A) ought to mean something. Inherent in this statutory

language is the expectation that a criminal offender will receive meaningful consideration for parole."

The plaintiffs in the instant litigation have pointed out that these are still numerous situations in which inmates – although placed in the correct offense categories as required by *Layne* – are still being denied "meaningful consideration" for parole for unreasonable lengths of time (sometimes years) after becoming eligible for parole.

The guidelines set up a grid system for classifying an inmate for purposes of parole eligibility. As described in *Poluka* at page 3:

> "The vertical axis of the grid lists 13 categories of offenses, one being the least serious offense and 13 the most serious offense. The horizontal axis of the grid lists eight risk of recidivism factors. By determining the category of offense and risk of recidivism applicable to a particular inmate and then locating the intersection of those categories on the grid, the APA arrives at a range of months to be served by the inmate before he becomes eligible for parole."

While the grid may serve its purpose in most cases, inmates with higher level felonies may have years added on to their minimum sentences without any reasons to back up the length of time except an intersection on a chart. The resulting amount of time to be served may bear no relationship to the number of years an inmate could serve under the new law or to the sentence imposed by the trial judge. As pointed out by the plaintiffs, under the guidelines, even when assigned the correct category, and even with the lowest possible risk score, everyone convicted of voluntary manslaughter (by trial

or plea) must serve at least 7 years because the lowest possible range on the chart is 84 to 120 months. A judge may have imposed a minimum sentence (with eligibility in 3.5 years) but the sentence given – whether minimum or maximum – is not likely to have any effect on the OAPA's decision. The process presupposes that the sentencing judge had no factual findings or legal reasons to sentence the defendant as he or she did.

The *Layne* court re-affirmed that the OAPA has discretion to consider all the facts and circumstances relevant to parole consideration. This court fails to see how the chart itself is relevant (or why it should be used at all) when the offender's risk score is zero or close to it.

Layne said that while the OAPA retains broad discretion, it is not enough to simply say an inmate is eligible for parole. Parole eligibility is meaningless when the minimum term of a range exceeds the date of statutory eligibility. While *Layne* was addressing placement of inmates in the correct offense categories, the same injustice is occurring with inmates whose first meaningful chance at parole comes several years after eligibility due to the operation of The Guideline Chart. The inmate is being denied the essence of true parole eligibility i.e. meaningful consideration for parole.

The defense argues that the OAPA has, indeed, departed from the "discretionary" guidelines from time to time. Thus, the guidelines do not dictate parole eligibility. However, the number of downward departures is negligible. Certainly, they are not frequent enough to show that "meaningful" considerations are routinely occurring. To the contrary, the numbers show

that the OAPA has intentionally disregarded new statutory sanctions for the same offenses as well as the sentences rendered by judges. S.B. 2's new definite sentences coincide very closely with the old minimum ranges of indefinite sentences. But the OAPA's "guideline" usually trump all of the above.

Use of the guidelines to deny meaningful consideration at earliest eligibility not only violates the language of *Layne* and the doctrine of separation of powers, it denies rights of contract to inmates who entered negotiated plea agreements.

Most inmates who are subject to the new guidelines entered prison when the old matrix was being used and they had every reason to believe its use would continue. Plaintiffs justifiably relied on the OAPA's longstanding and widely publicized application of the matrix.

They were also told that "good time" could reduce their minimum sentences by one-third. But under current practices, good time means nothing. Good time might get an inmate a hearing at an earlier date than otherwise, but it does not affect the time an inmate must serve under the guidelines. The guidelines presume good time. So, good behavior will not yield a downward departure. Not only is "good time" gone, so is the likelihood of being granted parole at or soon after the time the inmate becomes eligible. Some are serving two or three times the length of time they would be serving for the same offense either under the new laws or the old parole policies.

A plea agreement is a contract between the state and the defendant. The law in effect at the time the contact is entered is part of the contract as well as the

usage and customs relied on by the defendants. The defendants performed their parts by waiving trials and entering pleas. However, in 1998, the state unilaterally changed the terms. Defendants have the right to expect that their parole considerations will be conducted under the same rules and policies that were being used when they entered their pleas.

The guidelines in use since 1998 have effectively imposed additional punishment and admittedly are being applied retrospectively. But because of the dictates in *Layne* and the basic law of contracts, the court need not address the "ex post facto" and other constitutional arguments advanced by the plaintiffs.

Therefore, the court hereby sustains plaintiff's Motion for Summary Judgment and issues the following declaratory judgment.

(1) That the plaintiff class is entitled by contract and by statute to meaningful parole consideration that consists of true eligibility (rather than mere paper eligibility) and a parole hearing that complies with the policies and practices adopted by the OAPA after the *Layne* decision.

(2) That the defendants deny plaintiff class members contract rights and meaningful parole consideration whenever they:

(a) Assign of class member a guideline range which has a minimum term that exceeds the length of time a class member must serve before becoming eligible for parole under the law in effect at the time of the plea;

(b) Assign a class member an offense category that does not correspond to the class member's offense (or offenses) of conviction, or assign a class member an offense category that nominally corresponds but which is elevated based upon the defendant's independent determination that the class member committed a distinct offense (such as kidnapping in connection with rape) for which he was not convicted;

(c) "Flop" a class member for more than five years;

(d) Deny a class member a hearing or re-hearing that complies with defendant's post-*Layne* practices and policies

The defendant is hereby ordered to immediately rehear and grant meaningful consideration for parole to any class member who has had his or her plea agreement contracts breached in the manner described above. And new hearings must be granted.